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FREEDOM OF INFORMATION ACT, APPEAL OF TENNECO*

M-36918

January 30, 1979

Freedom of Information Act: (Act of June 5, 1967)

Denial of request for USGS's estimates of present value of royalties and taxes based on proprietary and confidential information furnished by sources outside Government is legally supportable under exemptions (4) and (9) of Freedom of Information Act (FOIA) since release would be the same as releasing the proprietary and confidential information from which estimates were derived as well as the geological and geophysical data. Further, exemption (5) of FOIA may be used as a basis for protecting presale estimates of value for a tract on which no bids are received since this is part of Departmental's deliberative process of decisionmaking.

Prior Solicitor's Opinions M-36779, Nov. 17, 1969, Appeals of Freeport Sulphur Co. and Texas Gulf Sulphur Co. and M-36841, Nov. 9, 1971, Appeal of Amoco Production Co. are distinguished with respect to the applicability of exemptions (4) and (9) of FOIA to the present value estimates and overruled with respect to the applicability of exemption (5) of FOIA to the presale estimates.

To: Assistant Secretary—Policy, Budget and Administration

From: Associate Solicitor, Division of General Law

Subject: Freedom of Information Act Appeal of Tenneco

By letter of Dec. 5, 1978, counsel for Tenneco Oil Co. has appealed the partial denial of its Freedom of Information Act (FOIA) request of Oct. 23, 1978, for 21 sets of documents. The Associate Solicitor for Energy and Resources responded to the initial request on Nov. 22, 1978. Most of the requested documents were released. The documents which were withheld and are in issue in this appeal concern items 4, 13, 15 (in part), and 21 of the request.

Item No. 4—This request was for estimates by the United States Geological Survey of the amount of present value of royalties and taxes which would accrue to the United States as a result of its leasing Tract 43–196 or the loss of present value of such receipts if the high bid were rejected.

We are advised that the USGS estimated the present value of royalties and taxes which would accrue to the United States as a result of leasing Tract 43–196 but did not estimate the loss of present values with respect to this tract. Hence only the present value figures are in issue. *Cf.* 43 CFR 2.13(f).

Item No. 4, with respect to the present value estimates, was withheld under exemptions (4) and (9) of the FOIA.

Exemption (4) to the FOIA, 5 U.S.C. § 552(b)(4) (1976), relates to "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

Exemption (9) to the FOIA, 5 U.S.C. 552(b)(9) (1976), applies to geological and geophysical information and data, including maps, concerning wells.

*Not in chronological order.

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With respect to the present value of royalties and taxes which were computed by USGS we are advised that release of such information would make it possible to calculate the oil and gas reserve estimates for those tracts which in turn would compromise proprietary geological and geophysical information that was furnished to USGS from sources outside the Government. Accordingly, it is our judgment that exemptions (4) and (9) may be applied to withhold this type of information since release would be the same as releasing the proprietary information from which it is derived. *See*, *Pennzoil Co. v. FTC*, 534 F.2d 627 (5th Cir. 1976). Since release of the proprietary information would do substantial harm to the competitive position of the outside sources from which it was obtained and would also inhibit the Government's ability to obtain this type of information in the future, which would have a substantial detrimental effect on the oil and gas leasing program, withholding fits within the criteria of *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765 (D.C. Cir 1974).[1]

In view of the determination that the information requested by item 4 may properly be withheld on the basis of exemptions (4) and (9) of FOIA, it is not necessary to consider exemption (5) which may also be applicable to protect the disclosure of this information.

Item No. 13—This concerns two memoranda that were prepared by the Branch of Marine Mineral Leasing, a component of BLM, for BLM consideration in connection with the leasing program. Because these documents were prepared by BLM officials, they qualify as intra-agency memoranda. Further, we are advised that the purpose of these memoranda was to provide advice and recommendations to BLM from one of its specialized components. It follows, therefore, that the opinions and recommendations in these memoranda constitute a part of the BLM's deliberative process of decisionmaking. Accordingly, it is our opinion that applying exemption (5) to these memoranda would be legally supportable. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975). The factual materials in these memoranda are contained in the charts attached thereto, which were released. *EPA* v. *Mink*, 410 U.S. 73 (1973).

Item No. 15—The portion of item 15 that was not released concerns the Geological Survey's estimate of the presale value of Tract 43–184, a tract which received no bids. Since the presale value is internally generated, it qualifies as an intra-agency communication. Further, since the purpose of this value is to serve as a "tool" whereby the Department discharges its responsibilities in administering the awards of oil and gas leases, the presale value also constitutes a

[1] Counsel for Tenneco has argued that Solicitor's opinions, M–36779 of Nov. 17, 1969 and M–36841, of Nov. 9, 1971, indicate that application of exemptions (4) and (9) would not be appropriate in this case. We disagree since those opinions did not concern the specific type of situation, as in the case here, where release of the present values of royalties and taxes would, in effect, reveal proprietary information that had been made available to USGS from sources outside the Government, as well as geologic or geophysical data.

part of the Department's deliberative process of decisionmaking. Consequently, we conclude that the withholding of the presale value of this tract, where no bid has been received would be within exemption (5). See *NLRB* v. *Sears*, *supra* and *Pitman* v. *Interior*, Civil Action No. 76–F–1022 (D.Colo. 1977). Since the Solicitor's opinion M–36779, was issued prior to the recent cases interpreting exemption (5) such as *NLRB* v. *Sears*, *supra* and *Pitman* v. *Interior*, *supra*, we do not consider that opinion as requiring release of the Government's prebid values of a tract in the situation presented.

Item No. 21—This concerns information with regard to Tract 43–196, requested in the memorandum of Mar. 29, 1978, by the New Orleans Office of the Bureau of Land Management from the Geological Survey, to be provided over the telephone. The information requested in paragraph A.1 of this memorandum is essentially the same as that requested by Tenneco via Item No. 4 and is withheld for the same reasons. The Geological Survey did not understand what information BLM wanted with regard to paragraph A.2 of this memorandum. It appears that the request was discussed and was modified and redefined over the telephone. We are advised that some information was transmitted by USGS in response to BLM's request but it is not clear what; that the information was taken down by BLM but the sheets of paper containing the information have not been kept. In any event since the disclosure of the type of information designated in A.2, to the extent it does exist would compromise proprietary geological and geophysical information furnished to USGS from sources outside the government, it is our judgment that exemptions (4) and (9) are applicable for the same reasons discussed with respect to item 4. In view of our determination that exemptions (4) and (9) apply as a basis for withholding the information, it is not necessary to consider exemption (5) which may also be applicable to this information.

In view of the foregoing it is our judgment that the partial denial of this FOIA request is legally supportable.

ALEXIS JACKSON,
Associate Solicitor.

APPROVED:

LEO M. KRULITZ,
Solicitor.

September 25, 1979.

APPEAL OF CARMEL J. McINTYRE*

4 ANCAB 24

Decided *November 30, 1979*

Decision of the Bureau of Land Management AA–6661–B, AA–6661–C.

Affirmed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal

*Not in chronological order.

Board: Appeals: Jurisdiction—Homesteads (Ordinary): Generally

The Board lacks jurisdiction to adjudicate the validity of homestead entries; the Board, rather, adjudicates the effect of ANCSA on such entries.

2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Res Judicata

The Board will not reverse a prior final decision of the Department where the appellant did not appeal such decision for 15 years, and now seeks reversal of such decision through a new administrative appeal. The principle of finality of administrative action bars consideration of such a new appeal when it involves the same claim of land and the same issues as were the subject of the prior appeal.

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Reconsideration

Where an appellant fails to appeal an administrative decision and, after 15 years, seeks reversal on reconsideration of that decision, and where reconsideration would prejudice third-party interests created in the interim, the Board will not reconsider such appeal.

4. Alaska Native Claims Settlement Act: Conveyances: Reconveyances

The appellant's possible rights to a reconveyance under § 14(c)(1) of ANCSA are not decided by the Board or affected by this decision.

APPEARANCES: Joseph W. Evans, Esq., Birch, Horton, Bittner, Monroe, Pestinger & Anderson, on behalf of the appellant; Edward G. Burton, Esq., Burr, Pease & Kurtz, Inc., on behalf of Eklutna, Inc.; and Russell L. Winner, Esq., Office of the Regional Solicitor, Dept. of the Interior, on behalf of the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEALS

The appellant seeks protection under ANCSA from conveyance to Eklutna, Inc., of 22.5 acres of land included in a homestead entry, made by his predecessor in interest, on lands withdrawn, at all times relevant to the entry, for a powersite. The Board rejects the appellant's claims and affirms the decision of the BLM because all the issues raised by Mr. McIntyre in this appeal have already been the subject of final administrative action within the Department of the Interior, or of Departmental decisions which were not appealed in a timely manner.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, the State Director or his delegate is the officer of the Bureau of Land Management, United States Department of the Interior, who is authorized to make decisions on land selection applications involving Native corporations under

the Alaska Native Claims Settlement Act, subject to appeal to this Board.

FACTUAL BACKGROUND

The decision here appealed approves for conveyance to Eklutna, Inc., pursuant to § 14(a) of ANCSA (85 Stat. 688, 702, 43 U.S.C. § 1613(a) (1976)), certain lands in the Eagle River valley within the Municipality of Anchorage, Alaska. These lands include the following described parcel:

T. 14 N., R. 1 W., Seward Meridian, Alaska
Sec. 23, S ½ NW ¼ SW ¼ NW ¼, SW ¼ SW¼ NW ¼, W½ SE ¼ SW ¼ NW ¼, SE ¼ SE ¼ SW ¼ NW ¼
Containing approximately 22.5 acres

The appellant claims as grantee of Durwood Cotton who in turn was the grantee of Robert Lowe, a homestead entryman. The 22.5 acres herein in dispute, located entirely in Sec. 23 of T. 14 N., R. 1 W., Seward meridian, are a part of the 160-acre homestead entry, located in Secs. 15, 22, and 23 of the same township. Crucial to the appeal is the history of the land in question in relationship to certain powersite classifications and withdrawals.

In 1925, Power Site Classification Number 107 was issued which included all unsurveyed lands within one-fourth of a mile of Eagle River, affecting, among other townships, Township 14 North, Range 1 West, Seward meridian. In 1950, Power Site Classification Number 399 was published, affecting all unsurveyed land adjacent to Eagle River at an altitude of less than 500 feet above sea level which was not already reserved by Power Site Classification Number 107. [Secs. 15, 22, and 23 of T. 14 N., R. 1 W., Seward meridian.]

In 1952, the Federal Power Commission issued a Determination Under Sec. 24 of the Federal Power Act (41 Stat. 1063, 1075 (1920) *as amended*, 16 U.S.C. § 818 (1970)), Docketed DA–59–Alaska, BLM, that the value of lands in T. 14 N., R. 1 W., Seward meridian, within one-quarter mile of or at an altitude of 500 feet or less adjacent to Eagle River, would not be injured or destroyed for purposes of power development by location or entry under the public land laws, subject to the provisions of Sec. 24.

In March of 1955, Robert Lowe filed his Notice of Location of Settlement or Occupancy Claim which initially affected lands in Secs. 15 and 22 of T. 14 N., R. 1 W., Seward meridian. He amended the Notice in March or April of 1955 and again on June 30, 1955, including, with the second amendment, the lands in Sec. 23 which are the subject of this appeal.

The appellant alleges, without contradiction, that in October of 1955 certain interpretations were issued by the Bureau of Land Management in Washington, D.C., conforming the powersite reservations to the plat of survey in T. 14 N., R. 1 W.; while these interpretations affected Secs. 15 and 22, they did not deal with lands in Sec. 23.

In February of 1957, Robert Lowe submitted final proof on his homestead entry, covering 160 acres in Secs. 15, 22, and 23 of T. 14 N., R. 1 W. A Notice of Filing of Plat of Survey and Order for opening of public lands was filed in July of 1957 which covered Secs. 15 and 22 but not Sec. 23. In September of 1957, Mr. Lowe filed his Application for Homestead Entry on 160 acres in Secs. 15, 22, and 23 of T. 14 N., R. 1 W. Seward meridian.

The appellant alleges, again without contradiction on the record, that in 1958 and 1959, he built a home on the property which he presently claims. It is unclear from the record what interest Mr. McIntyre held or claimed in the lands at that time. In May of 1959, Mr. Lowe's 160-acre homestead entry was divided by the United States District Court in Alaska in connection with a divorce between Mr. and Mrs. Lowe. Mr. Lowe received 80 acres, including 40 acres, more or less, in Sec. 23, and conveyed his entire 80 acres to Mr. Durwood Cotton, the appellant's grantor. The order of the court appears simply to have divided whatever interest Mr. Lowe had, in the interest of a property settlement, and apparently did not purport to adjudicate the validity of the homestead claim.

Robert Lowe died in 1960, and his homestead application was continued by Jesse M. McGahan, administratrix of his estate.

In February of 1961, Notice of Publication and Entry Allowed/Publication Authorized was issued concerning the entire 160-acre Lowe homestead entry. However, the Notice was vacated a month later and in April the land was withdrawn for Power Project 2296.

In April of 1962, Power Site Classification Numbers 107 and 399 were conformed to the plat of survey. This was done by plotting the 500-foot contour by photogrammetric methods and then reserving the land in those 2.5 acre aliquot parcels that most nearly conformed to the contour line.

This process of survey conformance left the 22.5 acres now claimed by Mr. McIntyre within the powersite classification.

Mr. McIntyre did not appeal the survey conformance and resulting delineation of the powersite classification boundary nor did his predecessor in interest, Mr. Cotton, or the administratrix of Mr. Lowe. It is unclear from the record whether any of these individuals received notice of the survey conformance or of their appeal rights, if any.

In September of 1962, the BLM state office issued a decision rejecting Mr. Lowe's application to enter and commuted proof under the homestead laws concerning the 22.5 acres here in dispute, because the land fell within Power Site Classification Numbers 107 and 399 as conformed to the plat of survey.

The basis of the original BLM decision was simply that the 22.5 acres within Sec. 23 were, at the time of entry, within the powersite classification. The decision stated, in pertinent part:

> Lands which are withdrawn or reserved are not subject to appropriation

under the public land laws, and unauthorized settlement on withdrawn or reserved lands obtains no rights for the settler. [Citations omitted.]

Consequently, as the records indicate that the following lands:

"S ½ NW ¼ SW ¼ NW ¼, SW ¼ SW ¼ NW ¼, W ½ SE ¼ SW ¼ NW ¼, SE ¼ SE ¼ SW ¼ NW ¼, Sec. 23, T. 14 N., R. 1 W., S.M."

containing 22.5 acres

are within the area withdrawn by Power Site Classifications Numbers 107 and 399 and Power Project 2296, as conformed, the application to enter and commutation final proof as to these lands must be, and hereby are rejected.

The decision was served on Jesse McGahan, administratix of the estate of Robert Lowe. She appealed to the BLM Division of Appeals and so did Durwood Cotton and the appellant in this appeal, Mr. McIntyre.

Affirming the original BLM decision of September 1962, the Chief, Branch of Land Appeals in a decision rendered Jan. 24, 1963, stated:

It can readily be seen then that the withdrawal of the lands for powersite purposes pursuant to Classifications 107 and 399 considerably predated any settlement or occupancy of the lands by the entryman. The records further show that under Docket No. DA 59 of November 14, 1952, the Federal Power Commission determined that the value of the lands in T. 14 N., R. 1 W., S.M., embraced in Power Classifications 107 and 399, would not be injured or destroyed for purposes of power development by location or entry under the public land laws, subject to the provisions of Section 24 of the Federal Power Act, as amended. However, such lands are not subject to location or entry under the public land laws until an appropriate order is issued by the Bureau of Land Management opening such land to location or entry under appropriate public land laws. No such order has been issued opening the land in question to entry or location. Accordingly, the lands were not subject to location or entry when the appellant filed his notice of settlement or occupancy claim. [Citations omitted.]

Mr. Cotton and Mr. McIntyre then appealed to the Secretary of the Interior, according to Departmental appeal procedure at that time. The Secretary reaffirmed the decisions below in March of 1964.

CONTENTIONS OF PARTIES

BLM now takes the position that the appellant has no interests protected under ANCSA because the land in dispute was withdrawn under Power Site Classifications 107 and 399 at the time the appellant's precedessor in interest filed his homestead entry, has remained continuously withdrawn ever since, and therefore was never available for entry under the homestead laws. BLM further argues that all issues raised by the appellant are res judicata because the same issues involving the same land were decided in the earlier appeals, or, alternatively, were not appealed timely.

The appellant contends that the land should not have *been* withdrawn under powersite classifications in 1955, when Robert Lowe filed his initial and amended notices of location. The Federal Power Commission determined in DA–59–Alaska, BLM, in 1952, that the value of the disputed land would not be harmed for power purposes by entries under the public land laws; it then became the obligation of the

Secretary of the Interior to revoke or modify the powersite classifications and open the land to entry. Had he done so, the land would have been open to entry when Mr. Lowe filed his notices of location and, in 1957, submitted his final proof which the appellant assumes would have been adequate. The homestead entry would then have taken precedence over the 1959 Power Site Classification Number 2296, and would be protected under ANCSA from Native selection.

As authority for his insistence on the Secretary's obligation to open the land to entry, the appellant cites *Reeves* v. *Andrus*, 465 F. Supp. 1065 (D. Alaska 1979), in which the court reversed, in part, a decision of the Interior Board of Land Appeals. (*Henry E. Reeves*, 31 IBLA 242 (1977).)

The Interior Board of Land Appeals had held that the Secretary in his discretion could refuse to restore lands in a powersite classification to entry after the Federal Power Commission determined that the powersite value of the lands would not be harmed by homestead entries. The court, on a motion for partial summary judgment, held that the Secretary, after such a Federal Power Commission determination, was required to restore the lands.

The court relied on the following language of Sec. 24, which was held to be unambiguous and mandatory:

> **Whenever the Commission shall determine that the value of any lands of the United States * * * classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, *the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes * * * as the Commission may determine*, subject to * * * a reservation of the right of the United States * * * to * * * use * * * said lands * * * for the purposes of this subchapter, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation * * * of said lands for said purposes.** (Italics added.) [*Reeves* v. *Andrus*, *supra*, at 1068]

The Department had contended that the Secretary would, upon cancellation of the powersite classification, have withdrawn the land pending settlement of Native land claims, and that the same protective result was reached by maintaining the powersite classification.

The court disagreed, holding "[t]o allow the Secretary to justify a powersite classification because Alaskan Native rights had to be protected would permit the Secretary to make a jumble out of the laws governing the public lands. It would also invite arbitrary use of power by the Secretary and inhibit judicial review of the Secretary's actions. There is no relationship in this case between the Secretary's purpose, the protection of Native rights, and the method used, a powersite classification. Other admitted powers of the Secretary to protect Native rights are irrelevant in the face of the command of 16 U.S.C. § 818." (*Reeves* v. *Andrus*, *supra*, at 1071.)

The appellant, Mr. McIntyre, denies that this appeal is res

judicata, because the issue of the Secretary's obligation to open lands to entry, after the Federal Power Commission determination, was not raised in his prior appeal.

Mr. McIntyre now asks the Board to treat his interest in the Lowe homestead as if the Secretary had, in 1952, opened the disputed land to entry. Alternatively, he asks the Board to refer the appeal to the Secretary for action consistent with the *Reeves* decision.

DECISION

The Board, although sympathetic to Mr. McIntyre's efforts to gain patent, cannot grant the relief sought.

The first reason is jurisdictional. The Board's jurisdiction in this matter is based on regulations contained in 43 CFR 4.1(5), which authorize the Board to decide appeals from decisions of Departmental officials on land selections under ANCSA. It is not within the function or jurisdiction of this Board to decide appeals from decisions on the disposition of land under the public land laws.

[1] The Board lacks jurisdiction to adjudicate the validity of homestead entries; the Board, rather, adjudicates the effect of ANCSA on such entries.

Sec. 22(b) of ANCSA, and regulations in 43 CFR 2650.3–1 provide for the exclusion from conveyance to Native corporations of lawful entries leading to the acquisition of title. Valid homestead entries are specifically protected under § 22(b).

The validity of the appellant's homestead entry is in dispute insofar as the status of the entry must be adjudicated in order to determine the protection to which it is entitled under ANCSA.

However, it is not necessary for the Board to seek adjudication of the appellant's claimed homestead entry, because the claim has already been adjudicated. As discussed, BLM in 1962 issued a decision rejecting the application of Robert Lowe, Mr. McIntyre's predecessor in interest, for the disputed land. That decision was appealed by the appellant to the Director of BLM and then, according to appeals procedure then current, to the Secretary, both of whom affirmed. Mr. McIntyre did not appeal the Secretary's final decision to the courts.

Accordingly, the next question is whether Mr. McIntyre's present appeal before this Board is barred by the related doctrines of res judicata or collateral estoppel, or by their administrative counterpart, the doctrine of administrative finality. The Board finds that it is.

[2] The Board will not reverse a prior final decision of the Department where the appellant did not appeal such decision for 15 years, and now seeks reversal of such decision through a new administrative appeal. The principle of finality of administrative action bars consideration of such a new appeal when it involves the same claim of

land and the same issues as were the subject of the prior appeal.

The distinction between res judicata and collateral estoppel is explained by the Supreme Court as follows:

> The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for the purpose." (Citations omitted.) The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. (Citations omitted.)
>
> But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." (Citations omitted.)

Commissioner v. *Sunnen*, 333 U.S. 591, 597–598 (1948).

Thus, in the rule applied by the courts, res judicata operates as a total bar to a subsequent suit between the same parties on all matters which might have been litigated; collateral estoppel prevents relitigation only of the "particular issue or determinative fact which was necessarily or actually decided by a previous decision of a different cause of action."

BLM argues that the present appeal embodies the same cause of action as the 1964 appeal, in that the appellant again pursues before the Department the same homestead claim, to the same 22.5 acres, as was previously denied. It is arguable that the appellant now asserts a new cause of action, insofar as the term is applicable in administrative proceedings, because the relief sought is not only the ultimate recognition of his homestead rights, but also the immediate exclusion of the disputed lands from the conveyance to Eklutna, Inc., under ANCSA. Regardless of whether the cause of action is considered the same, however, it is clear that the issue of the validity of the appellant's homestead claim was decided in the previous appeal. The appellant argues that the issue of whether or not the Secretary was obligated to open the land to entry, after the Federal Power Commission's 1952 Sec. 24 determination, was not addressed in the 1964 decision. The Board agrees that this issue does not seem to have been in dispute. The Secretary's decision expressly noted the Federal Power Commission's determination, and simply stated without comment that the land was not opened to entry:

> The record in this case shows that on November 4, 1952, the Federal Power

Commission made a determination (No. DA–59, Alaska) under section 24 of the Federal Power Act, as amended (16 U.S.C., 1958 Ed., sec. 818), that the land on the power site classifications could be opened to entry under the public land laws without destroying the value of the land for power development. However, the land was not opened to entry by this Department pursuant to that determination.

The Department obviously concluded that the Secretary was not obligated by the Federal Power Commission determination to open the land to entry. Thus, the issue now presented by the appellant in connection with the *Reeves* decision was resolved without argument by the Secretary in 1964, according to his interpretation of the law at that time.

The appellant argues that the doctrine of res judicata is a judicial rule exclusively, and that it is not properly applied in administrative proceedings. The Board cannot agree.

The courts, on occasion, apply the doctrines of res judicata and collateral estoppel to bar litigation, before the court, of causes or issues previously litigated and decided in administrative proceedings.

In a suit for breach of an employment contract, the court declined to apply collateral estoppel on an issue previously decided in an unemployment compensation proceeding because of the disparity in amounts claimed in the two actions, the fact that the employee had no legal counsel and did not appear at the compensation hearing, and similar reasons of fairness. However, the court noted:

> The majority of courts at one time rejected the application of collateral estoppel or res judicata to administrative decisions. In recent years, however, these doctrines have gained increasing recognition in administrative law. (Citations omitted.)

Lewis v. *International Business Machines Corp.*, 393 F. Supp. 305, 307 (D. Oregon 1974).

The Department has consistently applied res judicata and collateral estoppel in its quasi-judicial administrative proceedings. Refusing to reconsider an earlier rejection of a homestead application, the Interior Board of Land Appeals stated:

> A request to reconsider a final decision of the Department regarding rejection of applications for homestead entry is properly rejected in the absence of a showing of extraordinary circumstances. * * *In the absence of compelling legal and equitable reasons for reconsideration, the principle of *res judicata* and its counterpart, finality of administrative action, will bar consideration of a new appeal arising from a later proceeding involving the same claim and the same issues.

Dallas C. Qualman, 36 IBLA 119, 121 (1978). *See also Pekka K. Merikallio*, 30 IBLA 157 (1977); *Ben Cohen*, 21 IBLA 330, 331–32 (1975); *United States* v. *Blythe*, 16 IBLA 94, 101 (1974); *Eldon L. Smith*, 5 IBLA 330, 79 I.D. 149, 153 (1972).

This Board has ruled in *Appeal of State of Alaska*, 3 ANCAB 11, 18, 19 (1978) [VLS 77–11]:

> A prior decision of the Department will not be overturned by this Board where the claimant has failed to prosecute an

appeal from such decision and in essence acquiesced to the decision for a prolonged period of time. In this regard both the courts and the Department have previously so ruled:

"*Gabbs Exploration Co.* v. *Udall*, 315 F.2d 37, 41:

"Here neither plaintiff nor its predecessors in interest took timely action to have the wrong righted, and plaintiff cannot complain of the Secretary's failure to reopen the case. It is significant also that in all the cases cited to us in which a prior decision was reopened the longest period elapsing before reconsideration was three years.

"*Union Oil Co. of California et al*, 71 ID 169, 181, the Department held:

"When, as here, the administrative officer has acted within his jurisdiction and a judicial review of such action has not been sought on a timely basis, the principles of estoppel, laches and *res judicata* are merged in the doctrine of finality of administrative action and are operative to bar appellant's claim for relief."

The appellant argues that, in view of the *Reeves* decision, the Board should disregard, or apply "flexibly", the doctrines of res judicata and collateral estoppel, and should review and reverse the Department's 1964 decision rejecting his homestead claim. BLM responds that the Board lacks jurisdiction to review decisions of the Secretary, citing for support two decisions of this Board and one decision of the Interior Board of Land Appeals. (*Appeal of Wisenak, Inc.*, 1 ANCAB 157, 83 I.D. 496 (1976) [NG 75-1]; *Appeal of State of Alaska*, 3 ANCAB 285 (1979) [RLS 79-2]; *City of Kotzebue*, 26 IBLA 264, 83 I.D. 313 (1976). The Board does not consider these cases to be in point.

All three decisions held that appeals boards in the Department's Office of Hearings and Appeals lacked authority to review decisions of the Secretary. In all three cases, the decisions in question were decisions to withdraw public lands made by the Secretary in the exercise of statutory authority.

The decision presently in question is an appellate decision made by the Secretary in his quasi-judicial capacity. In 1964, the present Office of Hearings and Appeals did not exist, and the Secretary was exercising essentially the same function now performed by appeals boards of the Department.

The Office of Hearings and Appeals, comprising administrative law judges and appeals boards, is now an authorized representative of the Secretary for the purpose of hearing and determining appeals within the Department, as fully and finally as might the Secretary. (43 CFR 4.1 (1978).) Appeals boards have the power to review and reconsider their own decisions, in appropriate circumstances. (43 CFR 4.21 (c) (1978).) The appellant cites *United States* v. *Frank W. Winegar*, 16 IBLA 112, 178–179, 81 I.D. 370 (1974), for the proposition that administrative boards may also review and overrule prior decisions of the Secretary.

The Interior Board of Land Appeals in *Winegar* reviewed and overruled *Freeman* v. *Summers*, 52 L.D. 201 (1927), a published Departmental decision issued by the Secretary. In so doing, the Board reversed a long-standing Departmental position on the requirement

of discovery of a valuable mineral deposit in connection with oil shale claims. This reversal was based on the conclusion reached after lengthy analysis, that *Freeman* was clearly contrary to the mining law. The Board stated, as a rule of practice,

> Departmental precedent will be overruled where it is shown: 1) that it is contrary to the law as interpreted by the courts and this Department, and 2) it would result in the disposition of public lands to those not entitled to receive them.
>
> *Freeman* v. *Summers*, 52 L.D. 201 (1927), is overruled.

United States v. *Frank W. Winegar*, *supra*, 371.

BLM seeks to avoid the impact of *Winegar* by characterizing this decision as "concerned with the standards for reversing a prior precedent; * * * not concerned in any way with the standards for reconsideration of a prior final decision." (BLM's Response Brief, 16.) The Board cannot accept BLM's interpretation of *Winegar*.

Despite Interior Board of Land Appeals' reference to "Departmental precedent," it is clear that in *Winegar* that Board did, in fact, overrule a prior final decision of the Secretary, which had over many years been given precedential effect in the Department's interpretation of the mining laws in oil shale cases.

However, the circumstances in *Winegar* must be distinguished from those in the present appeal. In *Winegar*, the Department, through Interior Board of Land Appeals, changed its established interpretation of the mining law with regard to oil shale claims. Having announced the new position in *Winegar*, they simultaneously overruled their prior interpretation from *Freeman*, the previously precedential case. No issues of res judicata or administrative finality were involved, since there was no identity or parties or subject matter.

While *Freeman* was overruled and replaced by *Winegar* as Departmental precedent, *Winegar* was not applied retroactively to change the disposition of *Freeman* or any other previously decided appeal.

[3] Where an appellant fails to appeal an administrative decision of the Department to the courts and then seeks, after 15 years, to have that decision reversed through a new appeal involving the same parties and the same lands, and where third-party interests have been created in the interim consistent with the prior decision, the interest of the Department and the public in administrative finality must override the appellant's interest in retroactive application of a new precedent, and the Board will not review the prior decision in connection with consideration of a new appeal.

The only question remaining is whether the Board should reconsider the Department's 1964 decision, as distinguished from reviewing that decision in a new appeal. Regulations in 43 CFR 4.21(c) (1978) provide:

> Unless otherwise provided by regulation, reconsideration of a decision may be granted only in extraordinary circumstances where, in the judgment of the

Director or an Appeals Board, sufficient reason appears therefor.

Four factors deter the Board from reconsideration. First, the above-quoted language refers to decisions of the Director of the Office of Hearings and Appeals, or to an appeals board. There is no provision for an appeals board to reconsider a decision of the Secretary.

Second, the appellant has failed to demonstrate the existence of extraordinary circumstances. His arguments in favor of granting the homestead application were made in connection with the 1964 decision.

The only new "circumstance" is issuance of the decision in *Reeves* contrary to the Department's position on § 24 of the Federal Power Act. The appellant did not appeal the 1964 decision rejecting his homestead claim, and now seeks to benefit from a judicial interpretation of the law in unrelated litigation. The Department has consistently denied requests for reconsideration by appellants who failed to appeal timely to the courts. (*Pekka K. Merikallio, supra; Gabbs Exploration, supra.*)

Third, the appellant's reliance on *Reeves* apparently assumes that, had the Secretary opened the land to entry after the Federal Power Commission's determination, his predecessor in interest would unquestionably have obtained a vested title to the homestead entry. This is too speculative. The Board cannot conclude, 15 years after the fact, that if the land had been opened to entry, the appellant's predecessor would necessarily have successfully pursued his homestead entry.

Fourth, third-party interests have intervened and should not now be disturbed. Even if the Secretary was obligated to open lands to entry, the land was not made available and could not at any relevant time have been validly entered. Subsequently, additional power withdrawals for the benefit of the Municipality of Anchorage have attached to the land, as have selections by Eklutna, Inc.

[3] Where an appellant fails to appeal an administrative decision and, after 15 years, seeks reversal on reconsideration of that decision, and where reconsideration would prejudice third-party interests created in the interim, the Board will not reconsider such appeal.

Sec. 14(c)(1) of ANCSA provides that, upon receipt of patent, a village corporation "shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as a primary place of residence."

[4] This decision in no way affects whatever right the appellant may have to use and occupy the land he claims, and to receive patent to the land, pursuant to § 14(c)(1). This Board does not decide the question of whether the appellant is entitled to a reconveyance pursuant to § 14(c) or any question as to what Mr. McIntyre must receive if it is determined that he has rights under § 14(c).

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

JOSEPH A. BALDWIN,
Administrative Judge.

WHITE WINTER COALS, INC.

1 IBSMA 305

Decided *December 4, 1979*

Appeal by White Winter Coals, Inc., from a July 5, 1979, decision by Administrative Law Judget David Torbett in Docket Nos. NX 9-34-R and NX 9-35-R sustaining a cessation order issued for mining without a permit, a notice of violation for an alleged violation of the requirement to pass surface drainage from the permit area through a sedimentation pond, and a cessation order issued for failure to abate the conditions listed in the notice of violation.

Affirmed in part, reversed in part.

1. Surface Mining Control and Reclamation Act of 1977: Appeals: Effect of

Although, when a matter is appealed to the Board, OSM cannot take further action in the matter except to advise the Board whether the requested relief should or should not be granted, OSM can at any time move the Board to take what OSM feels is appropriate action.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders—Surface Mining Control and Reclamation Act of 1977: Environmental Harm—Surface Mining Control and Reclamation Act of 1977: Public Health and Safety

A cessation order is not properly issued under sec. 521(a)(2) of the Act when there is no suggestion in the record that the cited violation was creating an imminent danger to public health or safety or was causing or could reasonably be expected to cause significant, imminent environmental harm.

3. Surface Mining Control and Reclamation Act of 1977: Hearings

Any objection to the location of a minesite review hearing must be made before or at the time of the minesite hearing.

4. Surface Mining Control and Reclamation Act of 1977: Abatement

A refusal to grant an extension of time for abatement is not necessarily an abuse of discretion when the request for an extension was made after the abatement time had expired.

5. Surface Mining Control and Reclamation Act of 1977: Variances—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

Any exemption from the requirements of 30 CFR 715.17(a), concerning sedimentation ponds, must be sought from the appropriate regulatory authority.

APPEARANCES: Jerry Shattuck, Esq., Clinton, Tennessee, for White Winter Coals, Inc.; Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., and Charles Gault, Esq., Office of the Field Solicitor, Knoxville,

Tennessee, both for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

White Winter Coals, Inc. (White Winter), has sought review of the decision of Administrative Law Judge (ALJ) David Torbett sustaining Cessation Orders No. 79–II–12–3 and 79–II–12–5 and Violation 1 of Notice of Violation No. 79–II–12–4 issued to White Winter by the Office of Surface Mining Reclamation and Enforcement (OSM), under the provisions of secs. 521(a)(2) and (a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act).[1]

Although we disagree with the ALJ's conclusion that Cessation Order No. 79–II–12–3 was properly issued, we agree with his findings as to Violation 1 of Notice of Violation No. 79–II–12–4 and that portion of Cessation Order No. 79–II–12–5 issued for failure to abate Violation 1 of the Notice. We therefore reverse his decision in part and affirm it in part.

Background

On Feb. 14, 1979, three inspectors from OSM inspected White Winter's surface coal mine in Claiborne County, Tennessee. This mine was opened in 1977 pursuant to a State mining permit. As a result of the inspection OSM issued to White Winter Cessation Order No. 79–II–12–3 for mining without a current State permit in violation of sec. 502(a) of the Act, 30 U.S.C. § 1252(a), and Notice of Violation No. 79–II–12–4, listing two violations of the initial regulatory program regulations. Violation 1 alleged failure to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds before it left the permit area in violation of 30 CFR 715.17 and Violation 2 charged failure to retain all overburden and spoil material on the solid portion of the existing bench in violation of 30 CFR 715.14. White Winter was given until March 7 to abate the two violations listed in the notice.

During a March 8 follow-up inspection, the inspectors found that the two violations cited had not been corrected, and, in accordance with sec. 521(a)(3) of the Act, 30 U.S.C. § 1271(a)(3), issued Cessation Order No. 79–II–12–5 for failure to abate the violations.

On March 15 a minesite hearing was held in Norris, Tennessee. Although no one from White Winter attended the meeting, a letter received from Tom N. Shattuck, the owner and operator of the mine, was made part of the hearing record. The hearing officer upheld the issuance of the cessation order.[2]

On March 19 White Winter filed applications for review of both ces-

[1] 30 U.S.C. § 1271(a)(2), (a)(3) (Supp. I 1977). The Act can be found at 30 U.S.C. §§ 1201–1328 (Supp. I 1977). All further citations to the Act are to the 1977 Supplement to the United States Code.

[2] Minesite review report, Exhibit 4 to Appellant's brief.

sation orders and of the notice of violation. A hearing was held on June 21 before an ALJ. At the close of that hearing, the ALJ rendered a decision from the bench upholding the cessation order for mining without a permit and those parts of the notice of violation and second cessation order relating to failure to pass all surface drainage through a sedimentation pond. He vacated that portion of the notice of violation that alleged improper spoil placement. This oral decision was confirmed in writing on July 5.[3]

White Winter filed a timely notice of appeal of this decision on August 8 and filed its opening brief on September 6. Following the granting of a request for an extension of time, OSM filed its reply brief on October 5. On October 12 White Winter filed a request for oral argument. That request was granted on October 23 and the oral argument was held on November 20.

Issues on Appeal

The following issues raised by this appeal will be addressed:

(1) Whether OSM can vacate a cessation order after it has been appealed to the Board;

(2) If not, whether, on the facts of this case, a cessation order was properly issued for mining without a permit;

(3) Whether the notice of violation for failure to pass all surface drainage through a sedimentation pond was properly issued;

(4) Whether the location of the minesite hearing in this case failed to comply with the requirements of the regulations;

(5) Whether additional abatement time should have been granted to the operator; and

(6) Whether OSM should have granted White Winter an exemption from 30 CFR 715.17(a).

Discussion and Conclusions

[1] On page 2 of its brief, OSM stated that it had vacated Cessation Order No. 79–II–12–3, issued for mining without a permit. As we indicated in *Apache Mining Co.*, 1 IBSMA 14, 85 I.D. 395 (1978), once a matter is appealed to the Board, OSM cannot take further action in the matter except to the extent that it can advise the Board whether the requested relief should or should not be granted. If, however, after a review of the record, OSM feels that an appellant is entitled to the relief requested or makes its own determination that some other relief should be given, it can at any time *move* the Board to grant that relief.[4]

In this case, although OSM determined that the portion of its case against White Winter for mining without a permit should be dismissed, it failed to make a motion for dismissal.[5] In following *Apache*, *supra*, we find that OSM's at-

[3] In the written confirmation, the ALJ appeared to sustain both cessation orders in their entirety. Decision at 2.

[4] This conclusion does not preclude OSM from taking other action pursuant to 30 U.S.C. § 1271.

[5] At oral argument, OSM suggested that the Board could dismiss this cessation order. We decline to construe this suggestion as a motion to dismiss.

tempted vacation of the cessation order was ineffective.

[2] Thus we reach the issue of whether a cessation order was properly issued in this case for mining without a valid State permit. It is important to note first that White Winter had been operating under a State permit that was due to expire. Renewal procedures were begun by the company in what would normally have been adequate time to secure a new permit before the old one expired. Because of circumstances beyond the control of White Winter, the permit was not renewed before the expiration date. The company, however, remained subject to other environmental regulations. There is no suggestion in the record that White Winter's operations were creating an imminent danger to public health or safety or were causing or could reasonably be expected to cause significant, imminent environmental harm. Sec. 521 (a) (2) of the Act, 30 U.S.C. § 1271 (a) (2), requires one or both of these conditions as a basis for the issuance of a cessation order.[6] We therefore hold that Cessation Order No. 79–II–12–3 for mining without a permit was not validly issued. That cessation order is vacated.

The ALJ also sustained Violation 1 of Notice of Violation No. 79–II–12–4 which alleged failure to pass all surface drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds before it left the permit area. On appeal, as before the ALJ, the parties raise factual questions.

43 CFR 4.1171 places the burden of establishing a prima facie case as to the validity of a notice of violation on OSM. Once OSM has established its prima facie case, the operator bears the ultimate burden of persuasion. *See Burgess Mining & Construction Co.*, 1 IBSMA 293, 86 I.D. 656 (1979); *Island Creek Coal Co.*, 1 IBSMA 285, 86 I.D. 623 (1979); *Dean Trucking Co.*, 1 IBSMA 229, 86 I.D. 437 (1979). The ALJ found that the testimony of OSM's inspectors and the photographic exhibits established at least a prima facie case that runoff from one outslope would not pass through a sedimentation pond.[7] He apparently found unconvincing the testimony of White Winter's president to the effect that all runoff from that outslope drained back into the active pit and from there into sedimentation ponds. Thus, he held that OSM had carried the ultimate burden of persuasion.[8] We find no compelling reason to disturb that conclusion. Therefore, Violation 1 of Notice of Violation No. 79–II–12–4 is sustained. Likewise, that portion of Cessation Order No. 79–II–12–5 issued for failure to abate this violation is sustained.

[3] White Winter raised several other issues that we think should be addressed. White Winter contends that the minesite hearing on its

[6] Cessation orders issued under 30 U.S.C. § 1271(a)(2) must be distinguished from those issued under sec. 1271(a)(3). Sec. 1271(a)(3) authorizes the issuance of a cessation order when the violations listed in a notice of violation have not been properly abated, regardless of actual or potential effects on the public or the environment.

[7] Tr. 179–180.

[8] Tr. 180: "I think the OSM has carried the ultimate burden of persuasion, which is more than they are required to do."

cessation order failed to meet the requirement that a hearing should be "at the site or within such reasonable proximity to the site that any viewings of the site can be conducted during the course of public hearing." 30 U.S.C. § 1271(a)(5); 30 CFR 722.15(a). Appellant's first objection to the location of the hearing was made some 4 months after the hearing.[9] Whatever merits this objection may have had were waived by appellant's failure to object before or at the time of the minesite review.

[4] Appellant also urges that the time given to abate the violations listed in the notice of violation should have been extended because of adverse weather conditions and, in failing to grant an extension when requested to do so, OSM abused its discretion. The record indicates that White Winter did request an extension of time when OSM conducted its follow-up inspection.[10] That inspection, however, occurred after the initial time set for abatement had expired. We are not prepared to offer an opinion on whether it would be an abuse of discretion to deny an extension when the request was timely made and compelling reasons for an extension were advanced. But when the operator waits until after the time for performance has expired to make that request, we are prepared to say that OSM does not abuse its discretion by not granting an extension.

[5] Finally, White Winter suggests that the inspector should have granted it the exemption from the sedimentation pond requirement contemplated in 30 CFR 715.17(a). This section allows the regulatory authority to grant exemptions when the drainage area is small and it is shown that ponds are not required to meet the effluent limitations and water quality standards established in the regulations. In this context, the regulatory authority as defined in 30 CFR 700.5 is the state department with primary responsibility for administering the Act during the initial program, not OSM. Thus, we conclude that any relief from this requirement should have been sought from the State.[11] *See Alabama By-Products Corp.*, 1 IBSMA 239, 86 I.D. 446 (1979).

Therefore we hold that Cessation Order No. 79–II–12–3 was improperly issued and is vacated and that Violation 1 of Notice of Violation No. 79–II–12–4 and that portion of Cessation Order No. 79–II–12–5 issued for failure to abate violation 1 of Notice of Violation No. 79–II–12–4 were properly issued and are sustained. Judge Torbett's July 5, 1979, decision is thus affirmed in part and reversed in part.

IRALINE G. BARNES,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

MELVIN J. MIRKIN,
Administrative Judge.

[9] Tr. 16.

[10] Based on our reading of the record, we disagree with the ALJ's finding that White Winter did not request an extension of time (Tr. 181–182).

[11] The ALJ noted that state approval might have led him to vacate the sedimentation pond violation (Tr. 180).

ADMINISTRATIVE APPEAL OF THE MORONGO BAND OF MISSION INDIANS
v.
AREA DIRECTOR, SACRAMENTO AREA OFFICE

7 IBIA 299

Decided *December 13, 1979*

Appeal from Area Director's decision disapproving a proposed lease of trust land for outdoor advertising purposes.

Reversed.

1. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

Title I of the Highway Beautification Act, 79 Stat. 1028, which applies to all "public lands or reservations of the United States," does not apply to Indian Reservations.

2. Act of Aug. 15, 1953—Indian Tribes: Generally

Public Law 280, 67 Stat. 588–590, did not grant to states general civil regulatory powers over Indian reservations. Nor could this be accomplished by Departmental regulation, Secretarial Order or other directive.

3. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

California's Outdoor Advertising Act, implementing the Highway Beautification Act, 79 Stat. 1028, may not be applied to non-Indian lessees on the Morongo Indian Reservation.

4. Act of Oct. 22, 1965—Bureau of Indian Affairs: Generally—Indian Tribes: Generally

The Department's policy established in 1965 of requiring lessees of Indian lands in California to comply with State standards regulating land use and development can be achieved without subjecting developing tribal governments to the full enforcement powers of the State, viz., through adding appropriate State standards to the provisions of any lease.

APPEARANCES: Stephen V. Quesenberry, Esq., California Indian Legal Services, for appellant; James E. Goodhue, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Riverside, California, for respondent.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

The appeal decided here involves a claim by the Morongo Band of Mission Indians (appellant) that the Area Director, Bureau of Indian Affairs, Sacramento Area Office (respondent), erred in refusing to approve a lease agreement between the Band and the Naegele Outdoor Advertising Co., Inc., of California, for the purpose of erecting and maintaining outdoor advertising structures on the Morongo Indian Reservation.

The Area Director's decision at issue was rendered Mar. 14, 1978.[1] A notice of appeal was timely filed from this decision by California Indian Legal Services on behalf of appellant on Apr. 17, 1978, pursuant to 25 CFR Part 2. By memorandum dated Mar. 27, 1979, Acting Deputy Commissioner of Indian Affairs

[1] The Area Director's decision affirmed a determination made by the Superintendent, Southern California Agency, BIA, dated Aug. 29, 1977.

Martin E. Seneca, Jr., referred this appeal to the Board of Indian Appeals for resolution in accordance with the provisions of 25 CFR 2.19.[2]

In reviewing the decision appealed from and the briefs submitted by the parties, it is clear that resolution of this appeal depends primarily on the answer to the following question: To what extent, if any, does the Highway Beautification Act of 1965, 79 Stat. 1028, 23 U.S.C. § 131 (1976), apply to Indian reservations?

BACKGROUND

The genesis of this appeal can be traced to the struggle of the Morongo Band of Mission Indians to develop economically. This background is detailed in appellant's brief dated July 1, 1978, from which the following summary is adduced:

The Morongo Indian Reservation occupies approximately 32,300 acres of land in Riverside County, California, and is inhabited by nearly 300 members of the Morongo Band of Mission Indians. Because the reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges, only the few relatively flat acres located in the plain are suitable for economic development. A planning study conducted for the Band in 1972 identified a total of less than 1 square mile of reservation land as suitable for economic development. All of that land lies adjacent to Interstate Highway 10, which is a major east-west artery for travel to and from the metropolitan areas of southern California.

In addition to the Interstate Highway, the reservation is crossed by a main line of the Southern Pacific Railroad, the Colorado River Aqueduct, major oil tranmission pipelines, natural gas pipelines, and numerous electrical transmission lines, all of which serve the metropolitan Los Angeles area without any significant benefit to the reservation or its residents.

Despite the reservation's seemingly advantageous location for economic development, its economy is depressed and its population poor. The unemployment rate on the reservation is approximately 50 percent.

For many years a major source of income for the Morongo Band has been derived from outdoor advertising activities on tribal lands adjacent to Interstate Highway 10.[3]

[2] This regulation provides in relevant part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs shall:

"(1) Render a written decision on the appeal or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

[3] In an appraisal report dated Oct. 13, 1977, the Southern California Appraisal Office, BIA, identified outdoor advertising as "the highest and best use of reservation land along interstate 10."

Because the foregoing lands consist of property held in trust by the United States for the benefit of the Morongo Band, any tribal lease of the property for business purposes requires approval by the Secretary of the Interior pursuant to the provisions of 25 U.S.C. § 415 (1976), and regulations found in 25 CFR Part 131. The Bureau has refused to approve the Morongo Band's advertising lease with the Naegele company on grounds that the outdoor advertising proposed in the lease violates requirements of the Highway Beautification Act and California State law promulgated thereunder.[4]

DISCUSSION, FINDINGS AND CONCLUSIONS

Certain preliminary questions are answered before we address the main issue. First, the Field Solicitor (who represents the Area Director on appeal) asserts that it is inappropriate for the Board to entertain this appeal because the issues involved are the subject of litigation in *State of California* v. *Naegele Outdoor Advertising Co. of California, Inc.*, No. 126069, Superior Court of the State of California, County of Riverside. This is an action brought by the State of California, through its Department of Transportation, against the Naegele company for violations of California's Outdoor Advertising Act, Bus. & Prof. Code §§ 5200–5486, allegedly committed by the company in advertising activities on the Morongo Reservation.

There are indeed questions of law at issue in the foregoing case which also arise in this administrative proceeding, such as whether the Congress intended the Highway Beautification Act to apply to Indian reservations. The precise issue in the State Court proceeding, however, does not involve the lease dispute now before the Board. In this regard, neither the Morongo Band nor the Department of the Interior is a party to the action. In the absence of any court injunction or Secretarial directive precluding the Board from deciding the subject appeal, there is no legal reason why the Board cannot do so. Further, considerations of policy do not favor the continuation of disputes which are ripe for decision. Here, appellant has been pursuing a final administrative determination from the Department for over 1½ years. For the above reasons, the Board rejects respondent's contention that consideration of this appeal should be deferred or denied.[5]

Subsequent to the Area Director's disapproval of the lease at issue, the Morongo Band entered into an

[4] The Area Director's decision does not recite specific findings of fact or conclusions of law. In lieu thereof, the Area Director states:

"In view of the Riverside Field Solicitor's Opinion; Secretarial Order of July 9, 1965, 30 F.R. 8722; Solicitor's Opinion dated April 7, 1967, and circumstances surrounding the lease proposal of Naegele Outdoor Advertising Company, I hereby affirm the Superintendent's decision of Aug. 29, 1977."

[5] The Field Solicitor refers to another California suit, *State of California* v. *Hadley Fruit Co.*, Civ. No. 106415, Superior Court of California, County of Riverside, as one with a direct bearing on the issues before the Board. Appellant disagrees. The Board is informed that the above case has been settled.

"agency agreement" with the Naegele Company in March 1978. This agency agreement is explained by appellant in its brief dated July 1, 1978, as follows:

> During the pendency of these various appeals, the Business Committee of the Morongo Band, pursuant to the authority vested in it through the Band's enactment of Proposition 4 at its General Election of December 14, 1963, continued to consider the possibility of establishing an outdoor advertising industry on the Morongo Indian Reservation because of its potential for creating employment for Band members and for creating an income for the Morongo Band. After lengthy deliberations, it was decided that the most advantageous and expeditious way for the Band to do so would be for the Band to establish its own outdoor advertising enterprise immediately. Because the Band lacked the necessary technical expertise to do so immediately, the Band engaged an agent to commence and to operate certain aspects of this enterprise for the Band during a period when the Band would acquire its own expertise in the business. The Band has entered into an Agency Agreement with its agent [Naegele Outdoor Advertising Company of California, Inc.] for this purpose.

The Field Solicitor submits that appellant is "attempting to convert the appeal from the refusal to approve the lease into an Interior Board of Indian Appeals' ratification of an agency agreement [summarized above] and the Band's operation of an outdoor advertising sign business." Answer Brief filed June 4, 1979, at 2. Appellant denies this charge and maintains that Departmental ratification of the Band's agency agreement with the company is not required. Appellant's Reply Brief filed June 22, 1979, at 1–2.

It is neither necessary nor appropriate for the Board to render an opinion regarding the March 1978 "agency agreement." The Board's jurisdiction in administrative appeals is limited to a review of specific action taken by BIA officials in the performance of their duties under Chapter I of Title 25 of the *Code of Federal Regulations*. 43 CFR 4.350–4.353. To our knowledge, no BIA action has been taken regarding the agency agreement.[6] If some BIA action has occurred regarding the agreement, it is not reviewable by this forum in the absence of a proper appeal therefrom.

Thus, the sole question to be decided here is whether it was error for the Area Director to disapprove the proposed lease of trust land on the Morongo Indian Reservation to the Naegele company.[7]

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[6] According to the Field Solicitor, "at no time was the so-called agency agreement ever presented to the Superintendent, Southern California Agency, or the Area Director, for approval." Answer Brief at 2.

[7] The terms of the proposed lease are set forth in a letter to the Morongo Band Tribal Council from the Naegele Company, dated Aug. 10, 1977, which reads as follows:

"Gentlemen:

"Confirming our meeting and proposal to the Morongo Tribal Council on Aug. 8, 1977, we would like to propose the following for your approval.

"1. We would like to lease the North side of sections 10 and 12 and the South side of

(Continued)

The statutory authority which permits the leasing of Indian trust land for such business purposes as outdoor advertising is the Act of Aug. 9, 1955, 69 Stat. 539, *as amended*, 25 U.S.C. § 415 (1976). The Act provides that restricted Indian lands, whether tribally or individually owned, may be leased only with the approval of the Secretary of the Interior. In addition to prescribing the term of years for leases consummated under the Act, the statute provides:

> Prior to approval of any lease * * * the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject. [Act of June 2, 1970, § 2, 84 Stat. 303.]

The Department's regulations governing the leasing of Indian land are set forth in 25 CFR Part 131. These regulations are primarily aimed at insuring proper economic return to Indian lessors. *See* 25 CFR 131.5.

Based on the authorities incorporated by reference in the Area Director's decision (*see* n.4), it ap-

(Continued)
section 8 located on Freeway Interstate 10. We will only lease enough ground space to erect single pole signs. Each advertising structure will only have one pole with the ground base approximately thirty six inches in diameter.

"2. At this time, our plans call for fifteen different single pole structures, spaced approximately 1000 ft. apart. As we understand, your sections are one mile long on the freeway side. This will allow us to build five on each of the proposed sections.

"3. In order for Naegele to lease the above mentioned property, the Morongo Indians will have to own the poles for each advertising structure. Naegele will furnish and erect each pole and sell them to the Morongos for one dollar each. We can then lease the top of the pole for a total of $6,500 per year plus the annual increase as outlined on the attached page. At the end of our lease agreement we will buy back the poles for one dollar each or enter into a new lease at the agreement of both parties.

"4. The annual payment of $6,500 plus, will be made in annual installments in advance beginning Jan. 1, 1978. The payment schedule above will be established by the fact that we will have approval to start construction on the locations by October 1, 1977.

"5. In the event of future development of Morongo property, we will move our structure, including the pole fifty or one hundred feet or wherever it will not interfere with the development. This will be done at no cost to the Morongo Indians.

"6. The Hadley outdoor advertising signs can remain as far as we are concerned. But

(Continued)

(Continued)
all other advertising signs will be removed by us as their leases expire with you. The reason for this is, we do not want to create outdoor advertising clutter. We would like to have an exclusive right to lease any and all property that you want to lease for advertising on any road or freeway. This will also allow you to expect and get prompt payment from one advertising company, the 3rd largest outdoor advertising company in the United States.

"7. In the event the state finds a way or passes a law to prevent Naegele from leasing the top of each of your single poles through condemnation or whatever, we will pay you the lease money owed through the day we are forced to take down our signs and poles.

"8. Naegele will maintain all advertising structures, including the poles at no cost to the Morongos. We will also assume all cost for illumination and service for the signs. Naegele will also carry all insurance for liability. We will at all times protect the interest of the Morongo Indians.

"9. We will only build standardized outdoor structures, 14′ x 48′ with space for extensions, please see photo, or we will not exceed 1,200 sq. ft., which will meet state approval.

"10. We will also need the right of ingress and egress of the premises to erect, place and maintain all advertising signs and structures and any equipment therefore and post, paint or illuminate and maintain advertisements or such structures.

Very Truly Yours
Leon E. Howell
President"

pears that the Area Director disapproved the proposed lease on grounds that California and Federal laws controlling outdoor advertising along Interstate Highways were not satisfied by the provisions of the lease.

On appeal the Morongo Band has presented a comprehensive attack on the validity of the Area Director's action. Among other things, the Band alleges the following:

1. The Highway Beautification Act does not apply to Indian reservation lands.

2. Neither the Highway Beautification Act, Public Law 280, or any other proper legal authority confers on California power to implement its Outdoor Advertising Act on Indian reservations.

3. The Highway Beautification Act and the California Outdoor Advertising Act do not apply to non-Indian lessees of Indian trust lands.

4. The policy of the Secretary of the Interior to apply state land use standards to leases of Indian trust lands can be accomplished without subjecting the Band to state jurisdiction and enforcement measures.

DOES THE HIGHWAY BEAUTIFICATION ACT APPLY TO INDIAN RESERVATION LANDS?

The Highway Beautification Act of 1965, *as amended*, was enacted by Congress to provide for scenic development and road beautification of the Federal-aid highway systems. Title I of the Act (23 U.S.C. § 131 (1976)) contains requirements for the control of outdoor advertising. At 23 U.S.C. § 131(h), the Act provides:

> (h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary [in 1965, the Secretary of Commerce; now the Secretary of Transportation].

[1] In a memorandum opinion to the Commissioner of Indian Affairs dated Apr. 7, 1967, the Associate Solicitor for Indian Affairs concluded that "reservations of the United States" as used in subsec. (h) of 23 U.S.C. § 131 includes Indian reservation.[8] Upon careful review, we conclude that the Associate Solicitor's opinion does not reflect the state of the law on this subject.

The 1967 opinion relies primarily on the Department's disposition of three cases rendered over 65 years ago concerning rights-of-way across "reservations" for canal and ditch purposes.[9] At issue was whether the term "reservations" as used in the Act of Mar. 3, 1891, § 18, 26 Stat.

[8] In his concluding paragraph, the Associate Solicitor states that outdoor advertising on Indian reservation lands is subject "to regulations under the act." The opinion does not address whether outdoor advertising on Indian reservations is subject to both Federal and state regulation.

[9] 27 L.D. 421 (1898), overruling 14 L.D. 265 (1892); 33 L.D. 563 (1905); and 42 L.D. 595 (1913).

1101, 43 U.S.C. § 946 (1976), includes Indian reservations. The Department ruled in the affirmative and this position was followed by a Federal court in 1914. *United States* v. *Portneuf-Marsh Valley Irr. Co.*, 205 F.416 (E.D. Ida. 1913), *aff'd*, 213 F.601 (9th Cir. 1914).

As appellant argues on appeal, the Act of Mar. 3, 1891, vests power in the Secretary of the Interior to disapprove a right-of-way grant whenever he determines that approval thereof would be injurious to an Indian reservation.[10] On the other hand, the Highway Beautification Act of 1965, which relies on state action to enforce its standards, *see* 23 U.S.C. § 131(b)–(k) (1976), contains no special protection for Indian interests.

One indication that the Department has not considered the Highway Beautification Act applicable to Indian lands is its own regulatory response to the statute. In December 1970, the Secretary issued regulations invoking and expanding the outdoor advertising standards of the Highway Beautification Act with respect to public lands managed by the Bureau of Land Management. 43 CFR 2921.0–6. No such regulations have been issued by the Secretary with respect to Indian lands.

That the Highway Beautification Act was not intended to apply to Indian reservations is apparent from the enforcement provisions of the law. Under the Act, states are subject to a 10 percent reduction in Federal highway funds if they fail to regulate outdoor advertising in accordance with national standards. 23 U.S.C. § 131(b). States are authorized to employ their zoning or condemnation powers to achieve compliance with the Act. Sec. 131 (d)–131(g); 23 CFR 750.301–308. States may even impose stricter limitations than are found in the Act in controlling outdoor advertising. Sec. 131(k); 23 CFR 750.110, 750.155.

For the above measures to be taken by states on Indian reservations two well-established legal principles are necessarily forsaken: first, that tribally owned Indian reservation land is not subject to state powers of eminent domain, *Minnesota* v. *United States*, 305 U.S. 382 (1939); *United States* v. *10.69 Acres of Land*, 425 F.2d 317 (9th Cir. 1970),[11] and second, that states are not authorized to enforce their land use regulations on Indian reservations. *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655 (9th Cir. 1975). *cert. denied*, 429 U.S. 1038 (1977).

[10] The statutory proviso reads in pertinent part: "*Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation." 43 U.S.C. § 946 (1976). With respect thereto, see 27 L.D. 421, 423–424, 33 L.D. 563, 565 and 42 L.D. 595, 600, *supra*. In *U.S.* v. *Portneuf-Marsh Valley Irr. Co.*, *supra*, the Federal district court stated:

"It is pointed out that there is no apparent reason why an Indian reservation should not be subject to the grant of a right of way the same as any other reservation, especially in view of the fact that the Executive Department having jurisdiction thereof may determine whether a right of way can be granted without injury to the general purpose of the reservation, and extend or withhold approval accordingly." 205 F. 416, 419.

[11] Allotted lands are subject to state condemnation. Act of Mar. 3, 1901, 31 Stat. 1084, 25 U.S.C. § 357 (1976).

Unquestionably, the Congress, which has plenary authority over Indian affairs, *United States* v. *Kagama*, 118 U.S. 375 (1886), has the power to subject Indian reservations to the type of state regulation generally authorized in the Highway Beautification Act. However, based on principles enunciated by the Supreme Court in *Williams* v. *Lee*, 358 U.S. 217 (1959), regarding the limits of state power over Indian affairs, it is the Board's position that absent clear Congressional license to the states to control outdoor advertising on Indian reservations, such an intrusion by the states into "the right of reservation Indians to make their own laws and be ruled by them" is without sanction.

The term "reservations" is one broadly used "to describe any body of land, large or small, which Congress has reserved from sale for any purpose." *United States* v. *Celestine*, 215 U.S. 278 (1909). It may include military reservations, national forests, national parks, or any other Federally protected reserve.[12] Indian reservations are unique, however, since vital rights are vested in the Indians and tribes located thereon. Appellant refers to the Buck Act[13] as a clear example of Congressional recognition that Indian reservations are distinguishable from all other Federal reservations. As originally proposed, this Act would have allowed a state to impose its sales tax, use tax or income tax within "Federal areas," alternatively described as Federal "reservations" in the title of the bill. A series of inquiries from the Department of the Interior eventually led to a clarifying provision in the bill excepting reservation Indians from the coverage of the Buck Act.[14]

In the case before us, absence of statutory language expressly including or excluding Indian reservations as territory subject to the Highway Beautification Act renders the term "reservations" as used in sec. 131(h), ambiguous. This ambiguity has been recognized by the Department of Transportation, the Federal agency primarily responsible for national enforcement of the Act. By memorandum dated Dec. 19, 1977, an assitant chief counsel of the Federal Highway Administration furnished the Department of the Interior with a draft proposed amendment to 23 U.S.C. § 131(h) aimed at bringing Indian reservation areas within

[12] In concluding that the phrase "public lands and reservations of the United States" as found in the Act of Mar. 3, 1891, included Indian reservations, the Appeals Court noted in *United States* v. *Portneuf-Marsh Valley Irr. Co., supra*, that "[a]t the date of that act the Indian reservations were the only considerable reservations of the United States." 213 F. 601, 603.

[13] Act of July 30, 1947, 61 Stat. 641, 4 U.S.C. §§ 104–110 (1976).

[14] 4 U.S.C. § 109 (1976). See Appellant's opening brief filed July 5, 1978, at 4–7.

certain coverages of the Highway Beautification Act.[15]

To our knowledge, the legislative history of 25 U.S.C. § 131 (1976) reveals no reference to Indian reservations whatsoever. However, implicit in statements of the House Public Works Committee regarding the legislation is the recurring theme that enforcement of the Act could effectively be achieved through the zoning and condemnation powers enjoyed by states. House Report No. 1084, 89th Congress, 1st Sess., found in 1965 *U.S. Code Cong. & Adm. News*, pp. 3710–3736.[16] As previously stated, however, we believe these powers may be exercised by states on Indian reservations only when Congress expressly so authorizes. Under the circumstances, we find that the legislative history of the Highway Beautification Act supports the conclusion that Congress did not intend to include Indian reservations within the class of reservations affected thereby.

In ascertaining this intent of Congress, it is instructive that Indian lands are specifically identified in other Acts relating to the Federal-aid highway systems as appropriate. *See* 23 U.S.C. §§ 101(a), 103(b)(1), 120(a), 120(f), 120(g), 125(c), 203, 208, and 217(c). Congress obviously knew when and how to include language relating to Indian reservations in its Federal highway plan.

Appellant submits that in accordance with recognized canons of construction, doubtful statutory language must be interpreted in favor of the Indians. This is undoubtedly true with respect to Federal statutes dealing with Indians. *Worcester* v. *Georgia*, 31 U.S. (6 Peters) 214, 261 (1832); *Santa Rosa Band of Indians* v. *Kings County, supra; State of Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, — U.S. —, 58 L.Ed.2d 740, 758 (1979). Where the Federal statute involved is one of general applicability, such as the Highway Beautification Act, some courts are prone to apply normal rules of construction instead of rules which favor Indians. *See United States* v. *Allard*, 397 F. Supp. 429 (D. Mont. 1975); *cf. United States* v. *White*, 508 F.2d 453 (8th Cir. 1974).

In this case, it cannot be said that Indians are similarly affected as the general public if sec. 131(h) is deemed applicable to Indian reservations. Such a ruling would significantly alter the tribal sovereignty possessed by Indian nations. Since states have the authority under the Act to impose standards stricter than in the Act itself, such a ruling could mean economic termination of a tribe such as the Morongo Band whose primary source of income is derived from outdoor advertising. Because of the

[15] See pp. 41–46, Appellant's Attachments to Brief on Appeal, filed July 5, 1978. Among other things, the draft amendment called for a voluntary removal program on Indian reservation lands of nonconforming outdoor advertising signs.

[16] The regulations of the Federal Highway Administration concerning condemnation under the Act specify that they "should not be construed to authorize any additional rights in eminent domain not already existing under State law or under 23 U.S.C. 131(g)." 23 CFR 750.301.

unique tribal interests at stake here, it is not inappropriate to apply the rules of construction urged by appellant, notwithstanding the general nature of the Act in question. So doing, we are all the more satisfied that Congress did not intend the Highway Beautification Act to apply to Indian reservations.

PUBLIC LAW 280 AND DEPARTMENTAL STANDARDS

[2] The Field Solicitor submits that the California Outdoor Advertising Act may be enforced on Indian reservations by virtue of a Secretarial Order of July 2, 1965, published at 30 FR 8722. This directive (signed by Under Secretary John A. Carver) provides in part:

> **Pursuant to § 1.4(b), Title 25, Code of Federal Regulations (30 F.R. 7520), the Secretary of the Interior does hereby adopt and make applicable, subject to the conditions hereinafter provided, all of the laws, ordinances, codes, resolutions, rules or other regulations of the State of California, now existing or as they may be amended or enacted in the future, limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States and located within the State of California.**

The Field Solicitor points out that the above Secretarial directive has been construed by a California court as vesting the State with authority to apply its laws to lessees of Indian lands. *County of San Bernardino* v. *LaMar*, 76 Cal. Rptr. 547 (1969).

In a March 1970 opinion, former Secretary of the Interior Walter J. Hickel clarified the Department's position with respect to the 1965 Secretarial directive and expressly stated that the Department had no intention of following the ruling in *County of San Bernardino*, *supra*, noting that the United States was not a party to the litigation and had no notice of its pendency.[17] Secretary Hickel stated that, at most, California laws were noticed by the Department as standards for the agency to follow in approving leases of Indian land.

The Secretarial directive of 1965 and 25 CFR 1.4(b) are apparent attempts of the Department to apply or interpret the aims of Congress in its enactment of the Act of Aug. 15, 1953, 67 Stat. 588–590, *as amended*, commonly known as Public Law 280.[18] In 1976, the Supreme Court

[17] Mr. Hickel's opinion appears as appendix A to Appellants' Supplemental Statement in Support of Appeal, filed May 3, 1979. It is an unpublished opinion directed to interested parties in the zoning of lands of the Agua Caliente Indian Reservation in Palm Springs.

[18] The 1965 order contains the following proviso: "Nothing contained in this notice shall be construed in any way to alter or limit the provisions of sections 2(b) and 4(b) and (c) of the Act of August 15, 1953 (67 Stat. 588)." Several commentators have questioned the validity of 25 CFR 1.4 (*see, Public Law 280: The Limits of State Jurisdiction Over*

(Continued)

rendered the definitive decision that Public Law 280 did not grant to states general civil regulatory powers over Indian reservations. *Bryan* v. *Itasca County*, 426 U.S. 373, 390 (1976). The Court's decision in *Bryan* is consistent with Mr. Hickel's 1970 opinion that the Secretarial directive of 1965 was not a general jurisdictional grant to California to apply its regulatory laws in Indian country. Clearly, only Congress may accomplish such a result.

The Field Solicitor further contends that the California Outdoor Advertising Act is a prohibitory statute and thus comes within the purview of the criminal jurisdiction provisions of Public Law 280. It is the case that California has made any violation of its Act a misdemeanor. *Bus. and Prof. Code*, § 5464.

Appellant submits that under the above theory virtually any state licensing or regulatory law could be converted to a "criminal" law by merely providing that violation thereof constitutes a criminnal offense. We agree with appellant that Indian reservations would obviously be subject to wholesale regulation by state legislatures under the above interpretation. Dictum in the Ninth Circuit's decision in *United States* v. *Marcyes*, 557 F.2d 1361, 1364, (9th Cir. 1977) indicates that such a procedure cannot be countenanced. We so hold here on the basis that the California Outdoor Advertising Act is clearly a regulatory law and does not fall within the criminal jurisdiction provisions of Public Law 280.

REGULATION OF NON-INDIAN LESSEES

[3] The most difficult question in this appeal is whether the proposed lease with the Naegele company would be subject to state regulation if approved by the Department because of the non-Indian character of the enterprise. If so, the Bureau of Indian Affairs should possibly not be faulted for disapproving the lease if it fails to satisfy certain requirements of California's Outdoor Advertising Act.

In *Fort Mojave Tribe* v. *County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), the Appeals Court reaffirmed its earlier holding in *Agua Caliente Band of Mission Indians* v. *County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972), that a state possessory interest tax could be imposed on non-Indian lessees of Indian trust land. The Board has carefully evaluated the foregoing decisions and related cases. In our opinion, appellant has correctly distinguished the case at hand from those where courts have permitted state regulation of non-Indian lessees on Indian reservations:

However, *Fort Mojave* and *Agua Caliente* are distinguishable from the situation of the Morongo Band on at least two basic points. First, different state statutes are involved which, if enforced against the non-Indian lessee, will have varying

(Continued)
Reservation Indians, 22 U.C.L.A. L. Rev. 535, 586 (1975), by Goldberg. *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stan. L. Rev. 1061, 1091 (1974), by Chambers. In *Norvell* v. *Sangre de Cristo Dev. Co.*, 372 F. Supp. 348 (D.N.M. 1974), 25 CFR 1.4 was declared unconstitutional for lack of congressional authorization.

degrees of impact on tribal self-government. Assessment of a possessory interest tax on the leasehold interest of a non-Indian lessee is qualitatively different from enforcement of a land use statute (California Outdoor Advertising Act) against the same lessee. Second, a corollary of the first point, is the fact that assessment of a possessory interest tax is not an attempt by the State to exercise "general civil regulatory powers" [*Bryan, supra*, 426 U.S. at 390] over reservation lands.

State laws regulating outdoor advertising, like other state zoning and land use laws, fall within *Bryan's* prohibition against the exercise of general state civil regulatory authority on Indian reservations, absent an express grant of such authority from Congress. Moreover, the assessment of a possessory interest tax on the non-Indian lessee, unlike the regulation of outdoor advertising, is not a regulation of the use of the land and results in less of an intrusion into the areas of retained tribal sovereignty and tribal self-government. [Footnote omitted.]

Appellant's Reply Brief, filed June 20, 1979, at 18.

That the effect of state regulation on tribal sovereignty bears on the validity of a state's jurisdiction is explained in *Williams* v. *Lee*, *supra*, and *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

Here, we find the Morongo Band has made a persuasive showing, one which by proper accounts should have been attempted by its trustee,[19] that its self-government would be adversely affected by application of California's Outdoor Advertising Act to its non-Indian lessee.[20]

EXERCISE OF SECRETARY'S AUTHORITY

[4] Appellant observes that the Department's policy "to require lessees of Indian lands to comply with state *standards* regulating land use and development" as expressed in Secretary Hickel's 1970 opinion, "can be implemented without taking the drastic step of subjecting developing tribal governments to the full enforcement powers of the state." Appellant's Reply Brief at 20. The Band suggests that a reasonable approach would be to include State standards regarding placement, illumination, maintenance, etc., of outdoor advertising structures as provisions of any lease. The Board believes this to be a sound proposal. In undertaking this approach, however, the Bureau of Indian Affairs must insure that its own actions serve to protect tribal sovereignty.[21] This can be party accomplished by initially acquiring

[19] Under the authority of the Mission Indian Relief Act of Jan. 12, 1891, 26 Stat. 712, the United States issued a patent on Dec. 14, 1908, declaring that it would hold the lands of the Morongo Indian Reservation "in trust for the sole use and benefit of the said Morongo Band or Village of Indians."

[20] "[T]ribal use and development of tribal property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life." *Santa Rosa Band of Indians* v. *Kings County*, *supra* at 664; *see also, Bryan, supra*, 426 U.S. 388, n. 14.

[21] That this duty is incumbent on the Bureau of Indian Affairs in acting on proposed leases of Indian lands is addressed in Mr. Chambers' article cited in n. 18.

the Band's consent to the use of State standards.[22]

DISPOSITION

In accordance with the above discussion, findings and conclusions, the decision of the Sacramento Area Director dated Mar. 14, 1978, disapproving the proposed lease between the Morongo Band and the Naegele company is vacated. This matter is remanded to the Acting Deputy Commissioner of Indian Affairs with instructions that the Bureau of Indian Affairs seek to effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele Company consistent with this opinion.

In accordance with the authority delegated the Board under 43 CFR 4.1, this decision is final for the Department.

WM. PHILIP HORTON,
Chief Administrative Judge.

WE CONCUR:

FRANKLIN ARNESS,
Administrative Judge.

MITCHELL J. SABAGH,
Administrative Judge.

[22] This procedure is desirable to bring the Secretarial directive of 1965 into compliance with the 1968 amendments of Public Law 280 regarding tribal consent. Act of Apr. 11, 1968, 82 Stat. 78–80, 25 U.S.C §§ 1321–22 (1976). Tribal consent should not be a problem in this case. The Morongo Band has suggested the use of State law as a standard for regulating outdoor advertising on its reservation, and, in addition, the Band has repeatedly expressed its commitment to the general purposes of the Highway Beautification Act. See Appellant's Brief filed May 3, 1979, at 4; Appellant's Brief filed June 24, 1979, at 18–19.

APPEAL OF DOYON, LIMITED

4 ANCAB 50

Decided *December 14, 1979*

Appeal from the Decision of the Alaska State Office, Bureau of Land Management F–19155–26 (Dec. 5, 1975).

Reversed and remanded.

1. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway

Where conditions of exploration and settlement explain the infrequency or limited nature of actual use of a water body for commercial purposes, evidence of private use may be considered to demonstrate susceptibility of commercial use for purposes of determining navigability.

2. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway

Historic use of a water body by trappers may be properly considered in determining whether a water body has been used or is susceptible of use as a highway of commerce for purposes of navigability.

3. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway

Where pole boats, tunnel boats, and outboard river boats constituted the customary modes of trade and travel on a river and its tributaries, the use of these watercraft may be appropriately considered in determining whether rivers in the area were used or are susceptible of being used as highways of commerce.

4. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway

While recreational use, of itself, may not suffice to meet the susceptibility test for purposes of navigation for title, present use for recreation purposes may be properly considered, as a corroborating factor, in determining susceptibility for use as a highway of commerce.

5. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Impediments to Navigation

Physical impediments to navigation, such as gravel bars, riffles, or occasional log jams, do not, in themselves, make a water body nonnavigable.

6. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway

To be navigable, a river must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation.

7. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway

When the record shows that, historically, trapping was the primary reason for trade and travel in an area, and where the water body in question was commonly utilized by trappers as a route of trade and travel in boats of the period customarily used to freight supplies, such use will result in a finding that the water body has been used and is susceptible for use as a highway of commerce.

8. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway—Alaska: Navigable Waters: Impediments to Navigation

The presence of physical impediments on a water body will not result in a finding of nonnavigability when the record shows that the water body has been used and is capable of use as a highway of commerce.

9. Alaska Native Claims Settlement Act: Conveyances: Generally—Alaska: Navigable Waters: Use of Waterway

The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances and at all times.

APPEARANCES: William H. Timme, Esq., and Elizabeth S. Taylor, Esq., on behalf of Doyon, Limited; John W. Burke, Esq., Joyce E. Bamberger, Esq., John M. Allen, Esq., and M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; Frederick H. Boness, Esq., James N. Reeves, Esq., and Shelley J. Higgins, Esq., Office of the Attorney General, on behalf of the State of Alaska.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

The issue involved in this decision is whether the Kandik and Nation Rivers are navigable, within the selection area in question. If navigable, title to the beds of these rivers would have passed to the State of Alaska upon statehood pursuant to the Submerged Lands Act, 43 U.S.C. § 1301–1303, 1311–1315 (1976), and would thus not be available for selection by or conveyance to the Appellant, Doyon, Limited. Following a hearing and

final briefing on the evidence in this appeal, Chief Administrative Law Judge L. K. Luoma issued a Recommended Decision concluding both the Kandik and Nation Rivers were, at the time of statehood, navigable all the way from the Yukon River to the Canadian border, including the portions of the rivers within Doyon's selection area. The Board here affirms that decision. At issue, among other questions, is whether historic use of a river by trappers can be considered as evidence use or susceptibility for use as a highway of commerce; whether historic use of a river by watercraft other than steamboats, such as poling boats, tunnel boats, and river boats can be considered in determining whether a river was used or is susceptible to use as a highway of commerce. The Board rules in the affirmative on both these issues. Also an issue in this appeal, but not a part of the Board's decision at this time, inasmuch as it was previously remanded to BLM, was reservation of certain easements on other lands selected by the appellant.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977) (ANCSA), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

Pursuant to regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, the State Director or his delegate is the officer of the Bureau of Land Management, United States Department of the Interior, who is authorized to make decisions on land selection applications involving Native corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

PROCEDURAL BACKGROUND

On Jan. 5, 1976, the Appellant, Doyon, Limited, filed a Notice of Appeal from Decision F–19155–26 of the Bureau of Land Management (BLM) alleging that BLM erred in its determination that there were no navigable waters within the land areas selected by the appellant pursuant to ANCSA, *supra*, and, also, in the reservation of certain easements on these selected lands. (The easement issue was remanded to BLM Aug. 23, 1979.)

Basically, the appellant asserted that it filed a lands selection application pursuant to § 12(c)(3) of ANCSA, *supra*, for the surface and subsurface estates of three townships located within the "Kandik Basin" area, excluding the Kandik and Nation Rivers inasmuch as these water bodies were identified by the State of Alaska as being issued to the State upon statehood pursuant to the Submerged Lands Act, *supra*. In the decision on ap-

peal, however, BLM determined that these two rivers were not navigable waters and were therefore not titled in the State. The acreage contained in the beds of these rivers which lay within the selection areas were thus charged against appellant's entitlement.

By order dated May 10, 1976, the State of Alaska was made a necessary party to this appeal and in doing so the Board commented:

> Regarding the State's challenge to the Board's jurisdiction, the Board refers to the following regulations by which it is bound. Regulations in 43 C.F.R. 2650.5–1(b) (1975) require the Secretary to determine the navigability of bodies of water in order to determine whether the beds of such water bodies must be included in lands conveyed to selecting Native corporations. Regulations in 43 C.F.R. 4.901(1975) confer upon the Board jurisdiction over appeals relating to land selections. A decision to convey the bed of a water body to a Native corporation pursuant to a determination of non-navigability under the above-cited regulation is sufficiently adverse to the State's claim of title to the same lands to require the State's designation as a necessary party in this appeal.

On July 26, 1976, the Board amplified its earlier ruling stating:

> As defined in Section 3(e) of ANCSA, "'Public Lands' means all Federal lands and interests therein located in Alaska except: (not pertinent)" and further by regulations in 43 C.F.R. § 2650.0–5(g) adopted pursuant thereto as "(including the beds of all non-navigable bodies of water), except: (not pertinent)." Therefore, the issue of navigability must be determined to enable a finding to be made whether lands selected are within available "public lands" and further, to determine the effect on total acreage entitlement as provided in 43 C.F.R. § 2650.5–1(b).
>
> The Board therefore, concludes that it is not only authorized, but necessarily must decide issues of navigability of bodies of water located within lands selected by Native Regional Corporations.

At the conclusion of briefing on Oct. 21, 1977, the Board issued the following order:

> 1. Pursuant to regulations in 43 C.F.R. § 4.911(c) this Board finds that a hearing before an Administrative Law Judge is necessary on the issue of the navigability or nonnavigability of the two rivers which are the subject of this appeal. The Board, therefore, refers said issue to the Hearings Division of the Office of Hearings and Appeals with the request that a full hearing be held for the factual determination of the issue of navigability and that a recommended decision be rendered as a result thereof. Upon receipt of the transcript and the recommended decision, this Board will then make a final determination of the matter.
>
> 2. The test of navigability of the two rivers in issue on this appeal shall be, as proposed in briefs of the parties, the test stated in *Holt State Bank, supra.*
>
> 3. The burden shall be on the Appellant to establish the navigability of the two rivers in issue on this appeal.

On Apr. 18, 1979, following a conference attended by all parties, the issue of navigability was directed to an Administrative Law Judge for hearing and a recommended decision.

Commencing on Sept. 26, 1978, in Fairbanks, Alaska, a hearing was held before Chief Administrative Law Judge L. K. Luoma with all parties represented by counsel. Following completion of the record, post-hearing briefs were submitted.

On June 1, 1979, Judge Luoma's Recommended Decision was issued. Each party to the appeal was granted time from the receipt of the decision to file exceptions with the Board; however, only the Regional Solicitor's Office, on behalf of BLM, filed exceptions raising as objections the following:

1. The recommended decision fails to recognize that navigability for title purposes is determined by a two-part test.
2. The recommended decision fails to adequately explain and apply the "proximity test."
3. The facts recited in the opinion support the BLM's contention that the recommended decision applied the law erroneously.

The appellant on Sept. 5, 1979, filed its concurrence with the findings and conclusions of the Recommended Decision as well as a response to BLM's exceptions.

BASIS FOR DECISION

The record compiled in this proceeding and now before the Board consists of the BLM case file, the Board's file containing the Notice of Appeal, pleadings, briefs, exhibits, motions and preliminary rulings by the Board; exhibits submitted by the parties and admitted into evidence at the hearings; the hearing transcript; post-trial briefing submitted by the parties; and a Recommended Decision submitted by the Administrative Law Judge to the Board, and exceptions and concurrences thereto by the parties. It is on this record taken as a whole that the Board reaches its decision.

ISSUES

The general issue is whether the Kandik and Nation Rivers are navigable. If the rivers are navigable only in part, the issue becomes whether the rivers are navigable within the selection area. Specifically, if the rivers were navigable within the selection site at the time of statehood, title to the riverbeds thereunder passed to the State of Alaska upon statehood pursuant to the Submerged Lands Act, *supra*, as adopted by § 6(m) of the Alaska Statehood Act, 72 Stat. 339, *as amended*, 48 U.S.C. prec. § 21 note (1976), and would thus not be available for selection by or conveyance to the appellant and should not be charged against the appellant's entitlement.

DECISION

The appellant maintains that the Nation and Kandik Rivers are navigable and unavailable for selection and thus should not be charged against the appellant's acreage entitlement. The State of Alaska concurs with the appellant. The Regional Solicitor's Office, on behalf of BLM, defends BLM's finding of the nonnavigability of the two rivers in issue.

The Administrative Law Judge's Recommended Decision, which is attached as an appendix to this decision, holds that the rivers were navigable and in so deciding makes the following legal conclusion:

I find that the navigability for title test must be used in determining the nature of the Kandik and Nation Rivers. The issue is ownership of the beds of the Kandik and Nation Rivers for the purpose of determining whether they are public lands properly charged against Doyon's total acreage entitlement under the Alaska Native Claims Settlement Act. If the rivers are navigable then title to their beds is in the State; if, however, the rivers are nonnavigable then their beds are Federally-owned and are subject to conveyance to Doyon. There does not seem to be a clearer case of navigability for title purposes. In addition, the Alaska Native Claims Appeal Board ordered that the applicable test is that expressed in *United States* v. *Holt State Bank*, *supra*, which was a title navigability case. Finally, Alaskan courts have applied the title navigability test in similar situations. Accordingly, application of the more restrictive navigability for title test is appropriate. [p. 719]

There are essential elements of the navigability for title test. Navigability for title is determined by the natural and ordinary condition of a stream at the time that the State in which the stream is located entered the Union. A watercourse is probably nonnavigable for title purposes if artificial improvements are necessary to make it useful for trade and travel. The presence of rapids, sandbars, shallow waters, and other obstructions making navigation difficult or even impossible in sections, however, does not destroy title navigability so long as the river or part of it is usable or susceptible to use as a highway for commerce for a significant portion of the time. *United States* v. [*sic*] *The Montello*, 87 U.S. 430 (1874); *United States* v. *Utah*, 283 U.S. 64 (1931). The waters must be usable by the "customary modes of trade or travel on water." The essence of the test is that the waterway must be useful as a highway for travel and trade in the local area. Navigability is a factual question tested not by the amount or volume of commerce carried on a river, but by the extent that the commerce carried relates to the needs of the area it serves. A recent case emphasized that sporadic and short-lived use of a waterway for travel and transportation by local residents for their own purposes and not for hire meets the requirement that a waterway be useful as a highway for commerce. *Utah* v. *United States*, 403 U.S. 9 (1971). [pp. 719–720]

* * * * *

To be navigable, a body of water must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation, *Proctor v. Sim*, 236 p. 114 ([Wash.] 1925). The Kandik and Nation Rivers are tributaries of the Yukon River. The Yukon was historically the major highway of commerce for the whole of the interior of Alaska and the Kandik and Nation have been the only access of reaching a substantial area north of the Yukon. As such, the two rivers meet the proximity test, *Monroe v. State*, 175 P.2d 759 ([Utah] 1946). [p. 722]

Neither the Kandik nor Nation Rivers have been improved at any time. Accordingly, both in 1959 when Alaska entered the Union and at the present time, the rivers are in their natural and ordinary condition. Although rapids, shallow waters, sweepers, and log jams make navigation difficult on both rivers, the evidence shows that these impediments do not prevent navigation. [p. 722]

* * * * *

Although use of the Kandik and Nation Rivers has been slight in comparison with other rivers in more populated areas, the remote and sparsely settled nature of the area in which the Kandik and Nation Rivers are located is an important consideration. As in *Utah v. United States*, *supra*, carriage of goods on both the Kandik and Nation Rivers has been extremely limited. In fact, the only commerce conducted has been trap-

ping, trading, and the transport of supplies and furs by the few trappers on the river and the supplying of goods and mail to the International Boundary Commission. Nevertheless, despite only limited commerce on the rivers, use of the rivers meet requirements of the Federal test for navigability since the rivers have been used as a highway. [pp. 722–723]

* * * * *

The fact that the rivers are frozen for 7 months of the year and that much of the current mineral exploration of the area is done by use of airplane, does not make the rivers nonnavigable. It is not necessary that navigation continue at all seasons of the year, and a stream does not become nonnavigable even if it has fallen into disuse. *Kemp* v. *Putnam*, 288 P.2d 837 ([Wash.] 1955). [p. 723]

After review of the entire record in this matter, the Board finds that the Judge made proper findings of facts and conclusions of law, and hereby adopts and incorporates the Recommended Decision set forth in the appendix hereto. Consequently, it is the finding of the Board that title to the riverbeds passed to the State of Alaska upon statehood pursuant to § 6(m) of the Alaska Statehood Act, *supra*, which adopted the Submerged Lands Act, *supra*, and, therefore, the acreage of the beds of the two rivers should not be charged against the appellant's entitlement.

The Board has considered the exceptions taken to the Recommended Decision by the Regional Solicitor's Office, on behalf of BLM, and disagrees. The legal test for navigability was agreed upon by the parties and ordered by the Board on October 21, 1977. This test can be found in *United States* v. *Holt State Bank*, 270 U.S. 49, 56 (1926):

The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.

In its exceptions, BLM contends that the Recommended Decision fails to analyze adequately this test for navigability. BLM focuses on the Court's statement that streams "are navigable in fact when *they are used, or are susceptible of being used*, in their natural and ordinary condition, as highways for commerce." [Italics added.]

It is BLM's position that this statement requires a two-step inquiry into navigability, in which two different tests are applied in a set sequence. Both tests relate to use of the water body as a highway for commerce: the first test addresses actual historical use for this purpose. If sufficient historical use is not found, then—and only then—may the trier of fact apply the second test, which examines the susceptibility of the water body to use as a highway of commerce.

BLM relies for this proposition on a statement of the Supreme Court in *United States* v. *Utah*, 283 U.S. 64, 82 (1931):

> The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, *the susceptibility to use as a highway of commerce may still be satisfactorily proved.* (Italics supplied.)

Exceptions of the Bureau of Land Management, p. 2.

The "actual use" test, according to BLM, is historical, while the "susceptibility" test focuses on the physical characteristics of the water body and the likelihood of its future use. Following this approach, BLM contends that the evidence does not show sufficient historic use to support a finding of navigability, and that, invoking the second test, physical characteristics of the rivers likewise do not justify a finding of susceptibility to use.

BLM asserts that Judge Luoma erred in that, finding insufficient evidence to support a finding of navigability under either one of the two tests, he in essence combined the two tests, and used evidence relevant to one test to buttress a finding of navigability under the other.

The Board does not agree with BLM's analysis.

The Court in *United States* v. *Utah*, *supra*, was not attempting to lay down such a precise, formalistic test for navigability as BLM proposes. The Court in fact simply adopts the tests of navigability set forth in *United States* v. *Holt State Bank*, *supra*, and in earlier cases including *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

Referring to its own Master's report on the water bodies in question, the Court in *United States* v. *Utah*, *supra*, remarks without comment:

> The Master finds that on the Grand River, in the 79 miles between Castle Creek and the junction with the Green River, there is a stretch of about three miles * * * in which there are three small rapids, and that, in this stretch, the river is less susceptible of practical navigation for commercial purposes than in the remainder of the river. But the Master finds that, even in this three mile stretch, the river is susceptible of being used for the transportation of lumber rafts, *and that there has been in the past considerable use of the river for this purpose.* [Italics added.]

United States v. *Utah*, *supra*, 79.

Thus the Master, without adverse comment by the Court, used historical data—the "past considerable use"—to buttress a finding of susceptibility for use.

The Court in *United States* v. *Utah* rejected the government's contention that historical evidence of actual use, or the absence thereof, was controlling, and considered evidence of susceptibility for use as well. The opinion is permissive in tone, rather than restrictive; the Court broadens, rather than constricts, the scope of evidence which may be considered in determining navigability of a water body.

The Courts in *United States* v. *Holt State Bank*, *supra*, and numerous other cases have obviously contemplated inquiry into *both*

historical use and susceptibility for use in determining navigability. However, these approaches are neither sequential nor mutually exclusive. Both define areas of consideration in which evidence can be taken in making the overall factual determination on navigability of a particular water body. As explained in *United States* v. *Utah*, *supra*, at 83:

> The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.

BLM's main disagreement with the Recommended Decision lies with the finding of historic use sufficient to show that both rivers have been used or are susceptible to use as a highway of commerce. The findings related to use are summarized as follows:

> Boats capable of carrying commercial loads, *i.e.* such quantities of goods as are necessary on a given trip to produce a profit for the person making the trip, are capable of, and have gone up both rivers from the Yukon to the Canadian border. These are the poling, tunnel and river boats.

Recommended Decision, p. 722.

> Those working for the International Boundary Commission were paid to bring mail and supplies up the entire length of the Kandik and up the Nation to Hard Luck Creek. The Nation above Hard Luck Creek to the Canadian border was trapped by men, some of whom have made profits from furs. Until trapping became unprofitable in the 1940's, the trappers brought supplies up both rivers by boat and brought furs downriver by boat.

Recommended Decision, p. 722.

> Although use of the Kandik and Nation Rivers has been slight in comparison with other rivers in more populated areas, the remote and sparsely settled nature of the area in which the Kandik and Nation Rivers are located is an important consideration. As in *Utah* v. *United States*, *supra*, carriage of goods on both the Kandik and Nation Rivers has been extremely limited. In fact, the only commerce conducted has been trapping, trading and the transport of supplies and furs by the few trappers on the rivers and the supplying of goods and mail to the International Boundary Commission. Nevertheless, despite only limited commerce on the rivers, use of the rivers meet requirements of the Federal test for navigability since the rivers have been used as a highway.

Recommended Decision, p. 722.

> Because of the lack of trails and the rough nature in summer of the land surrounding the Kandik and Nation Rivers, travel by water has been the only feasible means of transport of goods between breakup and the time when the rivers freeze. Although the Kandik and Nation have been used only for intrastate commerce, such a use is acceptable under the navigability for title test. Navigability of a river is not tested by the amount or volume of commerce carried but the extent that the commerce carried relates to the needs of the area it serves. Both the Kandik and Nation are tributaries of the Yukon and even the upper reaches of both rivers are accessible to habitation and transportation routes. The rivers can be used to go someplace, as, for example, those employed by the International Boundary Commission used the Kandik to reach the Canadian boundary and trappers on the Nation used that river to obtain and transport

furs. In effect, both rivers have been used for commercial travel. Although the rivers are remote and the evidence of travel on them is sparse, commerce carried on the rivers has been sufficient to establish navigability since the commerce which has been shown to exist relates to the needs of the region in which the rivers are located. The question as to the practicability of navigating the rivers for profit must be left to the one who undertakes the enterprise.

Recommended Decision, p. 723.

BLM relies primarily on *United States* v. *Oregon*, 295 U.S. 1 (1935), to support its argument that "use by a few trappers" does not constitute commercial use and therefore trapping cannot constitute historic use that would clearly establish that a water body has been used or is susceptible of use as "a highway for commerce."

The BLM does not consider the use of small boats by trappers to be "commercial" in nature but has considered it to be "subsistence" use in the typical Alaskan setting. This approach was based primarily upon the authority of *United States v. Oregon* which found comparable use by trappers to be insufficient to support a determination of navigability. Possibly because of *United States v. Oregon* the recommended decision does not squarely face the issue, "Is use of boats by a few trappers 'commercial use' for purposes of navigability?" This is a fundamental legal issue in this case. It cannot be sidestepped.

Exceptions of the Bureau of Land Management, pp. 6–7.

BLM misinterprets the holding of *Oregon*, *supra*, on this issue. In reviewing the evidence related to trapping, the Court states:

> The evidence shows that, at times subsequent to 1890, a large number of animals were trapped in the tule areas, some in fall and spring, but principally in the winter months. *Most of this evidence has no bearing on navigability, for with a few exceptions, the trappers appear to have waded or walked.*
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> * * * * *
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> * * * The Special Master found that the boating which took place in the area involved had no commercial aspects *and was of such a character as to be no indication of navigability.* [Italics added.]

295 U.S. at 20–21.

BLM apparently interprets the Court's discussion to represent a finding first, that use of a water body by trappers is insufficient as the basis for finding historic use for purposes of navigability; and second, that there must be evidence of "commercial use" to support a determination of navigability.

The Board disagrees with BLM's analysis. The Master in *Oregon*, *supra*, found the limited manner of use by trappers was only one of a number of factors which, considered together, resulted in the conclusion of nonnavigability. The Court's discussion of the limited nature of boating in *Oregon* does not support a conclusion that use of boats by trappers, under different circumstances, could not satisfy the requirement of susceptibility for commercial use. The referenced language in *Oregon* does represent an interpretation by the Court that use of a water body must either have some commercial aspects or "be of such a character as to indi-

cate navigability," in other words, be of such a character as to indicate susceptibility for commercial use.

The argument related to the requirement of "commercial use," as opposed to private use was urged by the Federal Government in *United States* v. *Utah*, 283 U.S. 64. at 67, 68 (1931):

> No lake or stream has been declared navigable by this Court unless it appeared from the evidence that the stream or lake had actually supported a substantial waterborne commerce.
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> * * * * *
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> The words "commerce" and "useful commerce," as used in cases where navigability was the issue, must be interpreted as meaning the exchange and transportation of goods and a use of travel by the general public for commercial purposes. Personal use without the commercial element does not satisfy the test.

The Court rejected the argument that evidence of private use of a river is not sufficient to demonstrate capability for commercial use.

> The Government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. The extent of existing commerce is commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved.

United States v. *Utah*, *supra*, at 82.

[1] The Board affirms Judge Luoma's adoption of the holding in *United States* v. *Utah*, *supra*, (Recommended Decision, p. 718) and finds that where conditions of exploration and settlement explain the infrequency or limited nature of actual use of a water body for commercial purposes, evidence of private use may be considered to demonstrate susceptibility of commercial use for purposes of determining navigability.

Likewise, the point of the discussion concerning trapping in *United States* v. *Oregon*, *supra*, is not that use by a few trappers cannot constitute historic use that might clearly establish that a water body is susceptible of use as a highway of commerce. The Court simply finds that when the evidence as to the use of the area is unrelated to use of the water body in question, it has no bearing on navigability.

In *Oregon* the evidence showed heavy trapping in the area, but for the most part, the trappers did not make use of the water body in question for trade or travel by boat—they waded or walked. Further, in the *Oregon* case there is indication of population in the immediate vicinity of the water body that suggests there would have been boating activity other than trapping had the lake been navigable:

> Numerous witnesses who have lived in the vicinity for many years had never used a boat and had never, or rarely, seen one on the lake.

United States v. *Oregon*, 295 U.S. 1. 21 (1935).

In the present appeal, the factual basis for the ruling by the Administrative Law Judge, is not,

as BLM suggests, comparable to the factual basis for the ruling by the Court in *Oregon*, *supra*. It is undisputed that there are no settlements on either the Kandik or Nation Rivers and that the area was, and remains, undeveloped. Trapping was the primary, if not sole reason for trade or travel on the two rivers. The number of trappers, while small, was reasonable for what the drainage areas of the two river basins could support. (Tr. 99.) Testimony during the hearing, or submitted to the record later, linked the majority of the trappers identified as having used the rivers to the use of boats. (Sixteen of the twenty-one trappers identified as using the Kandik between approximately 1920 and 1940 used boats to freight supplies. Each of the seven trappers identified as having used the Nation used boats to freight supplies. (Tr. 52–56, 717–720, 724–725, *Report of Investigations*, Exhibit A–4, Richard O. Stern, Historian, Alaska Division of Forest, Land, and Water Management, and Charles M. Brown, Historian, U.S. Bureau of Land Management.) The boats used by these trappers included pole boats, tunnel boats, and outboard river boats, capable of carrying 1,000 pounds of freight and commonly used on other rivers in Alaska to freight supplies. (Recommended Decision, p. 718.)

[2] The Board does not contend that the use of a water body by trappers will necessarily result in a finding of historic use that would clearly establish susceptibility as a highway of commerce. However, the Board does find that historic use of a water body by trappers may be properly considered in determining whether a water body has been used or is susceptible of use as a highway of commerce for purposes of navigability.

BLM further objects to the finding in the Recommended Decision related to mode of travel:

> An important element of the *Holt State Bank* test of navigability requires that waters be usable as highways for commerce by the customary mode of trade and travel on water. The Supreme Court recognized in *Holt* that canoes and small row boats constituted important means of communication and transportation in early days throughout much of the west, and therefore, may be considered "commercial" for purposes of determining navigability for title. *United States* v. *Holt State Bank*, *supra*, 270 U.S. at 56–57.

Recommended Decision, p. 720.

BLM argues that the Court did not base its decision on the assumption that if canoes and rowboats can be used, a water body meets the "susceptibility" test, and further that *Holt* mentions neither the use of canoes or rowboats.

The Board agrees with BLM's objections as to the reference ruling in the Recommended Decision that "canoes and small rowboats" may be considered commercial for purposes of determining navigability.

The Court, in *Holt*, *supra*, did not attempt to list specific types or classes of watercraft that the Court would treat as "commercial" for a determination of navigability. The Court did restate an important legal criteria, laid down in *The Daniel Ball*, *supra*, at 563, against which the factual evidence of each navigability case may be weighed:

> [Rivers] are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted *in the customary modes of trade and travel on water*. [Italics added.]

It is true, as BLM argues, that the Court did not find that "canoes and small rowboats" can be considered "commercial" for purposes of determining navigability for title. However, the Court in *Holt Bank* did find that "navigability does not depend on the particular mode in which such use is or may be had * * * but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce." (*Holt Bank*, *supra*, at 56). The Court then proceeded to analyze the record before it, and found as evidence of useful commerce that "[e]arly visitors and settlers in that vicinity used the river and lake as a route of travel, *employing the small boats of the period for* [*travel*]." [Italics added.] (*Holt Bank*, *supra*, at 57.)

The evidence in the present appeal, pertaining to watercraft is summarized as follows:

> Transportation by water was one of the critical factors enabling the interior of Alaska to be opened to exploration and settlement (Tr. 94, 95, 806). The Yukon River provided the primary artery through Alaska (Tr. 132). * * * Soon after the purchase of Alaska by the United States, steamboat traffic on the Yukon began * * * . The use of steamboats was initially restricted to the Yukon and the Porcupine River, which was the only Yukon tributary on which steamboats could be used, until special light draft steamers were designed for use on the Tanana and Koyukuk Rivers (Tr. 45).
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> * * * By 1955 the Yukon commercial steamboat traffic has ceased (Exhibit A–2, p. 67).
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> There has been slow economic development in the Yukon-Charley area because of the absence of overland trails, and the Kandik and Nation basins are still underdeveloped (Tr. 95).
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> Although the Yukon steamboats carried the bulk of the commercial river traffic, a variety of watercraft has been used historically on the interior waterways.
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> The Yukon poling boats were adapted from boats used earlier on western rivers. * * * The larger steamboats were not used on the tributaries of the Yukon because there was not enough freight generated on those streams to call for use of these larger boats. Poling boats, however, were used on tributaries of the Yukon. Poling boats were used on a regular basis to serve communities and transport freight, and tunnel boats were used extensively by the Alaska railroad and others (Tr. 135, 138, 145, 170).
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> Motorboats came into use in Alaska after World War I. * * * Liftable motors were often attached to enable boats to travel over shallows. These boats are in use today and although the draught of the boats are constant, with the engine raised the boats can get over shallow spaces. The boats, accordingly, can be loaded more heavily (Tr. 161, 162).

Recommended Decision, pp. 717–718.

The Court in *The Montello*, 87 U.S. (20 Wall.) 430, 441–442 (1874), stated:

> *It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway.* The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted. it is navigable in fact, and becomes in law a public river or highway. [Italics added.]

The Board, likewise, believes it would be a narrow rule to hold that in Alaska, unless a river was capable of being navigated by steamboat, it could not be treated as a highway capable of supporting commercial usage.

[3] The Board therefore finds that pole boats, tunnel boats, and outboard river boats constituted the customary modes of trade and travel in the tributaries of the Middle-Yukon area, and the use of these watercraft may be appropriately considered in determining whether rivers in this area were used or are susceptible of being used as highways of commerce.

The Recommended Decision notes that the use of the Kandik and Nation Rivers did not begin and end with trapping-related trade and travel.

> Jet boats are in common use today and have been for the last 7 to 8 years (Tr. 758). Jet boats are flat-bottomed river boats 20–26 feet in length, approximately 4 feet wide, which are equipped with a 25 to 50 h.p. outboard motor with a jet unit (Tr. 567).

Recommended Decision, p. 718.

> Since statehood, there has been recreational use of the Kandik River. BLM's's [sic] Navigability Investigation Report on the Kandik and Nation Rivers notes that the Kandik and Nation Rivers are becoming popular recreational rivers.

Recommended Decision, p. 718.

There is testimony in the record of present use both by trappers and others. Melody Grauman, witness for BLM, states:

> There's quite a bit of use of boats on the Kandik and Nation by trappers, canoes with engines powered from six to ten horses, hunters, sports hunters from Fairbanks and elsewhere coming up in jet boats, air boats, and they're able to go quite far up the—up the river.

Tr. 116.

Government employees studying the rivers for various land management proposals testified to seeing other parties on the rivers during their trips over the past two years. (Recommended Decision, p. 718.

The Judge states:

> Although standing alone it may not suffice to support a finding of title navigability, use of the rivers by those pursuing a subsistence lifestyle and use of the rivers for recreation corroborate that the rivers are navigable. Hunters and canoeists do not bring their boats to these rivers by road and then use only selected portions of the rivers. Rather, hunters and canoeists get to the upper reaches of both the Kandik and Nation Rivers by way of the Yukon River. Those using the Kandik and Nation for recreation must bring any supplies needed with

them and they must carry out any game caught by boat.

Recommended Decision, p. 723.

[4] In the present case, historical use by trappers is within the living memory of some of the witnesses, and use of the rivers continues, although the purpose is increasingly for recreation rather than trapping. The Board affirms the finding in the Recommended Decision that recreation use, of itself, may not suffice to meet the susceptibility test for purposes of navigation for title. Present use for recreation purposes may be properly considered as a corroborating factor in determining susceptibility for use as a highway of commerce. The Board notes that if the type of watercraft used for recreation is capable of carrying a commercial load, and is commonly used to do so, then use of such watercraft offers some indication that the waterway is capable of being used for the purpose of useful commerce.

The BLM repeatedly expresses concern that the Recommended Decision ignores its considerable evidence as to the physical characteristics of the two rivers and that this evidence proves that the degree of difficulty precludes a finding that the Kandik and Nation are susceptible to use as highways of commerce. In fact, the Recommended Decision does consider the physical impediments to travel on these rivers, but concludes that "the evidence shows that these impediments do not prevent navigation." (Recommended Decision, p. 722.)

BLM contends that the Kandik and Nation Rivers are not navigable because their water levels fluctuate, they are hazardous, and only canoes, lightly loaded, can navigate them, because they are interspersed at various points by gravel bars or log jams. Finally, BLM contends that commercial boats carrying freight for hire have not traveled the rivers.

Recommended Decision, p. 722.

Although rapids, shallow waters, sweepers, and log jams make navigation difficult on both rivers, the evidence shows that these impediments do not prevent navigation.

The presence of gravel bars, riffles, or occasional log jams in themselves do not make the rivers nonnavigable, *United States* v. *Utah*, *supra*. Neither the Kandik nor the Nation has falls and rarely do obstructions block the channel completely. This is notwithstanding that there was testimony that one may have to pole or line a boat over shallow places. Even in August, a time of very low flow, several inches of water flowed over the gravel bars.

Boats capable of carrying commercial loads, *i.e.* such quantities of goods as are necessary on a given trip to produce a profit for the person making the trip, are capable of, and have gone up both rivers from the Yukon to the Canadian border.

Recommended Decision, p. 722.

BLM argues that the Judge's reliance on *United States* v. *Utah*, *supra*, is inappropriate because there was more evidence of historic use in that case before the Court than was established by the evidence in this case. Further, BLM argues the Court based its finding on evidence of physical characteristics rather than historic use, and an analysis of the testimony in this case shows that the Nation and Kandik have much less "capacity" for supporting commercial use than

the rivers discussed in *Utah, supra.* (Exceptions of the Bureau of Land Management, 7–8).

BLM is correct in stating there was more evidence of use in *Utah, supra,* than in the present case, but the record indicates that there was more population and economic activity in the area of the Green, Colorado and San Juan Rivers than there were or are in the Kandik and Nation area. The Court in *Utah* does analyze the physical characteristics of the water body, as does the Judge in the Recommended Decision in this case. In both cases, the finding is based on actual use.

> [W]hile there is testimony that in floods and periods of high water these rivers carry a considerable quantity of logs and driftwood, *the evidence as to actual trips* made by witnesses discloses little danger thereby incurred except in case of paddle-wheel boats. The Master's finding, which *the evidence supports,* is that this condition does not constitute a serious obstacle to navigation. [Italics added.]
> 283 U.S. 64 at 84.

[5] The Board affirms Judge Luoma's adoption of the holding in *United States* v. *Utah, supra,* that physical impediments to navigation, such as the presence of gravel bars, riffles, or occasional log jams, do not, in themselves, make a water body nonnavigable.

It is true that the Kandik and Nation are difficult rivers to navigate. It may be that the degree of difficulty evidenced in the record will constitute the outside limit of navigation for useful commerce. However, what the record in this appeal does show is that the rivers were used, not by a few people, but by—given the isolation and economics of the area—a surprising number of people, in watercraft capable of carrying and actually carrying, commercial-size loads customary to rivers tributary to the Yukon.

The fact that both the Nation and the Kandik are tributaries of the Yukon adds an important dimension to the finding that these rivers are susceptible to being used as highways of commerce. The judge finds:

> To be navigable, a body of water must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation, *Proctor* v. *Sim,* 236 P. 114 (1925). The Kandik and Nation Rivers are tributaries of the Yukon River. The Yukon was historically the major highway of commerce for the whole of the interior of Alaska and the Kandik and Nation have been the only access of reaching a substantial area north of the Yukon. As such, the two rivers meet the proximity test, *Monroe* v. *State,* 175 P.2d 759 (1946).
> Recommended Decision, p. 722.

Although the Recommended Decision discusses the so-called "proximity test" immediately after the finding that both the Kandik and Nation Rivers are navigable, it is apparent from reading the Decision as a whole that the access of the rivers to the Yukon is being treated in conjunction with the further finding of historic use as a highway of commerce. The Board disagrees with BLM's representation that the Recommended Decision treats the proximity test "as an alternative legal test for determining navigabil-

ity which is met solely by the fact that a waterbody flows into another navigable waterbody." (Exceptions of the Bureau of Land Management, 11.)

The Recommended Decision clearly does not rely solely on the location of the Kandik and Nation as tributaries of the Yukon to find navigability, but interweaves location as one of several factors which, taken together, result in a finding of navigability.

[6] Therefore, the Board affirms the finding in the Recommended Decision that to be navigable, a river must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation.

[7] In conclusion, the Board finds that when the record shows that, historically, trapping was the primary reason for trade and travel in an area, and where the water body in question was commonly utilized by trappers as a route of trade and travel in boats of the period customarily used to freight supplies, such use will result in a finding that the water body has been used and is susceptible for use as a highway of commerce.

[8] The Board further finds that the presence of physical impediments on a water body will not result in a finding of nonnavigability when the record shows that the water body has been used and is capable of use as a highway of commerce.

The Board adopts the undisputed finding of the Administrative Law Judge that neither the Kandik nor Nation Rivers have been improved at any time. Accordingly, both in 1959 when Alaska entered the Union and at the present time, the rivers are in their natural and ordinary condition. (Recommended Decision, p. 722.)

Finally, the Board adopts the finding of the Administrative Law Judge that both the Kandik and Nation Rivers are navigable all the way from the Yukon River to the Canadian border, and therefore the rivers as they flow through the selection area, are navigable. (Recommended Decision, p. 722.)

The Board recognizes BLM's concern that "the recommended decision sets forth a standard under which it is difficult to imagine any river in Alaska to be nonnavigable." (Exceptions of the Bureau of Land Management, 5.)

The same concern was expressed by appellees in *The Montello*, *supra*, at 437:

> If the Fox River is a navigable stream of the United States, it would be impossible to conceive of any body of water that is not or might not become such navigable water.

Just as the *Montello* decision did not result in blanket navigation determinations, neither will the Kandik and Nation decision. The facts of each case will be examined on their merits.

[9] Simply stated, the question of navigability is factual. BLM urges its concern for having a "yardstick" for future navigability determinations in Alaska. The Board is

sympathetic to this concern. However, it will not undertake to do what the United States Supreme Court has not attempted, *i.e.*, to define in precise, checklist fashion the requirements for navigability of a body of water. Though not a title case, *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 404 (1940), expresses the position of the Court: "The legal concept of navigability embraces both public and private interests. It is not to be determined by formula which fits every type of stream under all circumstances and at all times."

Consideration of factual determinations made in other cases can no more than assist in the process. *United States* v. *Utah*, *supra*, at 87:

> The Government invites a comparison with the conditions found to exist on the Rio Grande in New Mexico, and the Red River and the Arkansas River, above the mouth of the Grand River, in Oklahoma, which were held to be non-navigable, but the comparison does not aid the Government's contention. Each determination as to navigability must stand on its own facts.

BLM concedes that Judge Luoma summarized the evidence carefully in his Recommended Decision. The Board concurs, and finds in making a factual determination of the navigability of the Kandik and the Nation Rivers that the Recommended Decision applied proper principles of law and that its conclusion is supported by the evidence.

ORDER

Insofar as the Decision of the Bureau of Land Management F–19155–26 found the Nation and Kandik Rivers, within the selection area in question, to be nonnavigable, such Decision is hereby reversed and remanded to the Bureau of Land Management for action consistent with the finding that the two rivers are navigable.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,
Administrative Judge.

ABIGAIL F. DUNNING,
Administrative Judge.

JOSEPH A. BALDWIN,
Administrative Judge.

APPENDIX

June 1, 1979

MEMORANDUM

To: Alaska Native Claims Appeal Board
From: Chief Administrative Law Judge
Subject: Appeal of Doyon, Ltd., Administrative Appeal (ANCAB RLS 76–2)

Pursuant to the Board's Order of October 21, 1977, I am forwarding herewith my recommended decision, together with the complete record made in the subject proceedings.

Copies of the recommended decision have been served on all parties, who are allowed 30 days from the receipt thereof to file exceptions with the Board.

L. K. LUOMA

June 1, 1979

Appeal of Doyon, Ltd., from Decision of Bureau of Land Management #F–19155–26

ANCAB RLS 76–2

Navigability of Kandik and Nation Rivers

RECOMMENDED DECISION

Appearances: Elizabeth S. Taylor, Esq., Fairbanks, Alaska, for Appellant;
Shelley Higgins, Esq., Anchorage, Alaska, for the State of Alaska;
John M. Allen, Esq., and Frances Neville, Esq., Regional Solicitor's Office, Department of the Interior, for Appellee.

Before: Chief Administrative Law Judge Luoma

BACKGROUND

On Dec. 5, 1975, the Bureau of Land Management, Appellee (hereinafter, BLM), issued a decision approving certain lands for interim conveyance to Doyon, Ltd., Appellant (hereinafter, Doyon), pursuant to the provisions of the Alaska Native Claims Settlement Act.[1] This decision stated that there were no navigable water within the areas which had been selected by Doyon. Doyon appealed the navigability issue to the Alaska Native Claims Appeal Board. In an order issued on May 10, 1976, the Alaska Native Claims Appeal Board joined the State of Alaska (hereinafter, the State) as a necessary party in the appeal because a determination of nonnavigability would be adverse to the State's claim of title to the land under the Kandik and Nation Rivers. On Oct. 21, 1977, the Board referred the matter to the Chief Administrative Law Judge for a fact-finding hearing and recommended decision. A hearing was held on Sept. 26 1978, in Fairbanks, Alaska.

Doyon has selected two parcels of land in the area of the upper Yukon River. Through one of these parcels flows the Kandik River; through the other flows the Nation River (Tr. 11). BLM determined that neither of these rivers was navigable, and accordingly the acreage of those parts of the beds of the rivers which are located within the selection areas were charged to Doyon, pursuant to 43 CFR 2650.5–1(b).[2]

Navigability is an issue in this case because the Alaska Statehood Act[3] made the Submerged Lands Act applicable to Alaska. The Submerged Lands Act, 43 U.S.C. § 1301 (1976), *et seq.*, generally provides that title to the submerged lands underlying navigable waters passes to the State at the time of statehood. If the Nation and Kandik Rivers are navigable waters, title to their beds would have passed to the State upon statehood and could not be conveyed to Doyon by BLM.

The Nation and Kandik Rivers are tributaries of the Yukon River. Both the Kandik and the Nation have their headwaters in the Olgilvie Mountains which are located in the Yukon Territory, Canada. The mouths of both rivers are on the north bank of the Yukon River in the area between the villages of Eagle and Circle, Alaska. Various witnesses referred to the geographical area in which the Kandik and Nation as well as a portion of the Yukon Rivers flow as the "Yukon-Charley." Accordingly, I will use the term "Yukon-Charley" to refer to the region

[1] 43 U.S.C. § 1601, et seq. (1976).

[2] 43 CFR 2650.5–1(b) provides, in part:
"Surveys shall take into account the navigability or nonnavigability of bodies of water. The beds of all bodies of water determined by the Secretary to be navigable shall be excluded from the gross area of the surveys and shall not be charged to total acreage entitlements under the act. Prior to making his determination as to the navigability of a body of water, the Secretary shall afford the affected regional corporation the opportunity to review the data submitted by the State of Alaska on the question of navigability and to submit its views on the question of navigability. Upon request of a regional corporation or the State of Alaska, the Secretary shall provide in writing the basis upon which his final determination of navigability is made. The beds of all bodies of water not determined to be navigable shall be included in the surveys as public lands, shall be included in the gross area of the surveys, and shall be charged to total acreage entitlements under the act."

[3] 72 Stat. 339, § 6m.

in which the Kandik and Nation Rivers are located.

ISSUE

The issue is whether the Kandik and Nation Rivers are navigable in whole or in part. If the rivers are only navigable in part, the issue becomes whether the rivers are navigable within the selection areas (Tr. 9, 74).

Facts

Approximately 7 miles of the Kandik River flows within the selection area located on that river. The selection area is approximately 47 miles upstream from the mouth of the Kandik (Tr. 447, 448). There are approximately 3 miles of the Nation River within the selection area located on that river. The selection area is approximately 35 miles from the mouth of the Nation.

The rugged part of the Ogilvies are in Canada and not along the Kandik or Nation basins. The Nation River tends to flow in a southwest direction and is located against the west side of its basin. The Nation basin, which is generally no wider than 15 to 20 miles, from ridgetop to ridgetop, at its widest point, is a small basin, is very narrow, and is linear in shape. The Nation is a smaller river than the Kandik, has a more narrow channel and meanders more tightly than does the Kandik (Tr. 64). There are only a few major tributaries to the Nation among which Ettrain and Hard Luck Creeks are the largest. Both of these tributaries are less than 20 or 30 miles in length. The Nation is characterized by many shallow areas where log jams form, and the river has a fluctuating water level which is a result of the small watershed. The river is in permafrost country and, as a result, when it rains the water can only percolate down the watershed rather than sink into the soil. There are many obstructions on the river. The river is a sometimes braided, sometimes meandering, stream in its entirety. The river drops between 15 and 20 feet a mile, on the average, from the headlands to the mouth.

A braided river is a stream which has broken apart into many channels. At any given time there may be water in all the channels, or there may only be water in some or only in one. Where the water flows at any given time, in a braided stream, depends on when the last high water occurred. A meandered stream is one which has a single well-defined channel, which loops back and forth (Tr. 543, 544).

In the lower stream area, and at the mouth, the Nation is braided into many channels. At Hard Luck Creek the stream thread averages approximately 100 to 150 feet in width, yet even here, at some places, the river narrows. Throughout the entire length of the river, in narrow areas against the banks, the water is 4 to 5, perhaps 6 feet deep. These deep areas are separated, however, by gravel bars which often run completely across the river. In August 1978, there were approximately 135 shallow areas downstream of the selection area on the Nation (Tr. 347). Although the river is braided for much of its length, during low summer flow there is normally only one channel carrying water.

From mid-June through freeze-up, depending on whether there has been rain, both rivers are free of ice. The approximate time of freeze-up is early to mid-November. The rate of flow of the Nation River averaged, in June 1978, 5 to 6 miles an hour. In August, the flow was reduced to 1 or 2 miles per hour (Tr. 712–13). The Nation is considered to be a moderately swift stream, and the river bed is generally gravel. The area in which the Nation is located is remote. The mouth of the river is 60 miles downstream from Eagle, which has a relatively small population. Habitation within the Nation basin consists of seasonal occupancy by trappers.

The Kandik is bigger than the Nation and is centrally located in its basin. The maximum width of the Kandik's basin is

about 20 miles, from ridgetop to ridgetop, and the Kandik basin has a rolling mountain character as does the adjacent Nation basin. Where the Kandik enters the Yukon River it has a single mouth and there is a defined channel for a quarter to a half of a mile inland. Above this area, the river becomes a shallow stream. Upstream to the vicinity of Judge Creek, which is about 24 river miles, the Kandik is alternately meandering and braided and the general thread of the stream is this area is 100 to 150 feet in width. Above Judge Creek the river meanders through a short area of open tundra. From Johnson Gorge upstream through the selection area, which is a total of 20 miles, the Kandik is confined on one side or the other of the basin and the river, in this area, has a very defined channel, with deep water. In all, from the mouth of the Kandik to the selection area there were 70 shallow areas in August 1978 (Tr. 398). Above the selection area to Big Sitdown Creek the river meanders and widens. From Big Sitdown Creek which is above the selection area the river gets continually smaller and shallower. In Canada there are just three small streams coming together to form the river channel. Between the selection area and the mouth of the Kandik the elevation drops a total of 500 feet in 37 miles (Tr. 668–71).

That portion of the Kandik which flows through the selection area is deep, is free from gravel bars, and has a uniform bed. The water level of the Kandik which is located within the selection area was too high to measure in June 1978. In August 1978, the Kandik was 4–6 feet deep within the selection area. In June 1978, the water was so deep in that portion of the Nation which flows through the selection area that no flow measurements could be taken. The water of the Nation was .3 of a foot and .6 of a foot respectively, in August 1978, as it flowed over two gravel bars within the selection area on the Nation; however. the river was 3–4 feet deep in the channel through the selection area at the same time.

The Kandik is more stable than the Nation in its flow characteristics, because it has a larger basin. The Kandik, however, reacts in the same fashion to sudden rainfall but peaks of flow may last slightly longer than in the Naton. In June 1978, water was flowing in the Kandik at the rate of 5 miles per hour. In August, the flow was 1 mile per hour (Tr. 712–13). Both streams are clear, and the elevation loss is approximately the same. One person lives on the Kandik year round, at the mouth of the river. Remoteness of the Kandik River is the same as that of the Nation (Tr. 561–73). Circle is located on the Yukon River downstream from where the Kandik enters the Yukon. Circle has a small population.

A sweeper is a tree growing in dirt riverbanks which has been undermined by the action of the current. The river, as it flows, eats away the bank and undermines the ground on which a tree is growing. The tree gradually slants towards, and sometimes into, the creek. Sometimes these undercut trees are horizontal to the river. Often the main channels of both the Kandik and Nation flow under sweepers and there are numerous sweepers on both the Kandik and Nation Rivers (Tr. 62). The danger is that a loaded boat can be carried by the current into sweepers and there is a possibility that the boat can be overturned as a result (Tr. 63). During floods, these sweepers are often pulled out of the banks and the trees are pulled downstream by the current. The trees then lodge on gravel bars, etc., and create log jams. There are numerous log jams on both the Kandik and Nation Rivers. Log jams are considered permanent obstructions in that they often remain in one place for many years (Tr. 515). No river in the interior of Alaska, however, is free from hazards, even the Yukon. Gravel bars, sweepers, and log jams for instance, are common and virtually every Alaskan river has them, although on some Alaskan rivers these hazards may not be as frequent as on the Kandik and Nation (Tr. 464).

Temperatures in the area where both the Kandik and Nation Rivers are located range from 70 degrees below zero to more than 90 degrees above. The average annual temperature of the region is approximately 20 degrees F. Annual precipitation in the area averages 8 to 12 inches (Tr. 624). More than 50 percent of the precipitation falls as rain during the summer, the remainder of the precipitation is winter sleet and snow. Snow cover in the area lasts approximately 7 months (Tr. 47, 257, 566, 718–19).

In the general vicinity of the Kandik and Nation River basins there generally is a heavy rainfall almost every day during the summer because the general weather pattern in that area produces rainstorms in the afternoon, or at night. These storms, however, might not hit the Kandik or Nation drainage areas and weeks may pass without rain in these particular drainage areas. Conversely, depending on where the storms develop, there may be 3 or 4 days in a row during which the rain falls in the Kandik or Nation basins. Accordingly, given this very local weather situation, there is no predictability of the occurrence of high and low water levels on the subject rivers (Tr. 289).

A flashy stream is one where changes in water flow occur rapidly within a very short time. A very flashy stream is one where peak water flow is three to five times the daily mean average (Tr. 522, 523). In a very flashy river, during periods of extreme low flow, it would be impossible to plan ahead as long as a week in determining when high water peaks will come. Sometimes a traveler can only determine an hour ahead when high water will come (Tr. 699).

Conditions that contribute to the flashiness of a particular stream include a small drainage basin, a steep drainage basin, a drainage basin that is thoroughly impermeable at the surface, such as would be the case in either a thinly soil-covered drainage basin or an area with significant permafrost, and the absence of lakes. The Kandik and Nation basins meet these conditions. Flashiness, by itself, is not an impediment to navigation (Tr. 687, 709, 710). If there was no rain for a very extended period of time, it is possible that water could cease to flow in the rivers; however, if such were to happen, pools of water would remain. A boat could be floated on these pools for some distance (Tr. 672). During periods of high water significant impediments to navigation result from floating debris and log jams, whereas during periods of low water, the principal impediments are the gravel bars (Tr. 349, 350).

BLM distinguishes between recreational use of rivers and use of a river basin as an area where a subsistence lifestyle is pursued. Recreational use is nonfunctional in an economic sense. A subsistence lifestyle is extremely functional in an economic sense in that it centers on a search for food (Tr. 276). The subsistence lifestyle has been pursued by some in the Kandik and Nation basins since the 1960's. Although few, if any, people lived on either river during the 1950's, others living on the rivers in the 1930's and 1940's, as did the Natives before them, pursued a subsistence lifestyle (Tr. 265–67).

Those living a subsistence lifestyle are very much dependent on the rivers. Anything used to supplement their diet must be brought from Eagle or from Circle. To get supplies to their camps, these people use boats with a motor or they use dogs to pull thir supplies or the supplies are lined up the river. Almost all the people pursuing this lifestyle live on a tributary stream or river.

There are two techniques used in lining a boat. One technique is hand lining which requires a 100-foot length of rope. One end of the rope is attached to the bow of a canoe and the other end of the rope is attached to the stern of the canoe. By manipulation of the length of the lines with the stern line being the longer, the boat can be moved upstream. The other technique is to have a dog in harness at a

point on the line that is equivalent to where the man would normally be. Lining a canoe is not difficult (Tr. 251, 252).

The first inhabitants of the Yukon-Charley area were the Han Athabascan Indians. There is a lack of documentation concerning Native use of the area and no comprehensive historical or anthropological study of the Natives has been done (Tr. 82–83, 793). Prior to the arrival of Europeans in the area, the Hans had settled primarily in three or four different villages along the Yukon and the Natives subsisted on the resources available in the region. The Natives fished primarily for salmon in the Yukon during the summer, hunted caribou in the mountains during the fall, hunted various other game throughout the year, and trapped during the winter. The Han traveled extensively for subsistence purposes but remained primarily at the Yukon villages for most of the year. Charley's village was located at the mouth of the Kandik River until 1914 when it was destroyed by a flood (Tr. 48). The number of Han Indians living in the region prior to the arrival of Europeans was less than one thousand. The Natives used birchbark canoes, flatbottomed canoes, longer (30-foot) traveling canoes, very long, narrow hunting canoes with poles, and later, rafts and scows (Tr. 84). The Natives sometimes used skin boats to float down the rivers (Tr. 91–92).

Natives used the area of the Upper Kandik for hunting (Tr. 48). They hunted and floated down in moose skin boats (Tr. 115). One trader saw a musk ox which the Natives had killed at the headwaters of the river (Tr. 48). Today, no Natives live in the Yukon-Charley area (Tr. 79).

The first European contact with the Yukon-Charley region came as a result of the early fur trade. In 1847 a British trading post was established near the confluence of the Porcupine and Yukon Rivers. In 1848 another British post, Fort Selkirk, was established in Canada. The Yukon-Charley region is approximately halfway between these posts.

In 1867 the United States purchased Alaska from Russia. Soon thereafter a number of American trading companies became involved in the Alaska fur trade. During the trading season of 1874 only 32 non-Natives lived on Alaska's three major rivers—the Yukon, Kuskokwim, and Tanana. In 1880 the first trading post in the Yukon-Charley area was established. In 1882 another trading post was established near Eagle.

Some of the fur traders who explored the Yukon also prospected for gold. The establishment of trading posts encouraged prospectors because the posts ensured a source for provisions.

In 1892 the first gold strike occurred in the Yukon-Charley area near Circle (Tr. 39). From 1896 to 1902 the Yukon-Charley area was the center of gold activity (Tr. 43). By 1898 five towns had been established on the Yukon between the towns of Eagle and Circle. A gold strike in Nome in 1900, however, quickly depopulated the Yukon-Charley area. The town of Nation was the only settlement between Eagle and Circle which was still populated after 1900 (Tr. 43–44).

After the goldrush in the Yukon-Charley ended, the remaining inhabitants of the area turned to a combination of mining, wage labor, and subsistence hunting, fishing, gathering, and trapping (Exhibit A–2, p. 56). This lifestyle has generally continued to the present.

Although there was prospecting north of the Yukon, there are no known gold strikes, nor have any recorded claims been found on either the Kandik or Nation basins (Tr. 50, 96). The Yukon mineral activity took place south of the Yukon (Tr. 34). Coal was discovered near the mouth of the Nation River and in 1897 a commercial company began mining operations. Approximately 2,000 tons of coal were mined and transported to the Yukon for use on river steamers or for transport to Dawson. The coal was sledded in winter from the mine down the river until the river meandered. At

that point the coal was taken overland to the Yukon (Tr. 108). The mining operation lasted only a few years since it proved to be uneconomical.

There is no record of traders using the Kandik, although prospectors may have explored the river (Tr. 49). The area north of the Yukon River received historical attention primarily because of the work of the International Boundary Commission in 1911 and 1912. The Commission surveyed and mapped the geography and geology of the 141st meridan between the Porcupine and Yukon Rivers.

In 1911, parties for the International Boundary Commission came into the area, and had four launches at their disposal. Two of these launches were constructed especially for the Boundary Commission. The launches were 40 feet in length, 9 feet wide, and had a draft of approximately 18 inches. These two sternwheelers, however, drew more water than the designers had intended. Consequently, after the survey work was finished during the summer of 1911, the boats were overhauled and redesigned. As a result, there was a slight increase in the boats' overall speed, and the draft was reduced to between 14 and 16 inches. Together the two launches could handle barges carrying 7 to 12 tons. Commercial steamboats on the Yukon were also utilized to transport men, horses, supplies, and equipment. Poling boats were constructed and utilized by the Boundary Commission on those rivers where it had been determined that the two launches could not operate (Tr. 796–97).

The International Boundary Commission, which surveyed the U.S.-Canadian Boundary in 1910–1912, was supplied by poling boats which were capable of carrying 1 to 1½ tons of supplies (Tr. 49, 90). One man had a contract with the Boundary Commission to deliver hay and grain 90 miles to the border on the Kandik (Tr. 52, 90). Approximately 2 tons of supplies were transported to the Boundary Commission by poling boat and scow (Tr. 50, 812). The poling boats brought supplies up the Kandik River to the vicinity of the boundary. Those bringing the supplies up the Kandik River had to line their boat, but could pole the boat through still places. They also had to make channels with shovels through shallow parts of the river, and then line the boat through the channels. Sometimes they made 5 to 6 miles a day. It took them almost a month to reach their destination and after delivering the supplies, they descended the river in 6 hours. The return trip was made after a cloudburst and the river was very high (Tr. 149 Exhibit A–4).

Once at the boundary, the supplies were packed over land in order to follow the boundary line directly south. No one river or stream flows in that direction, and it was necessary to stick close to the boundary line (Tr. 800–01). The International Boundary Commission paid for the transportation of its supplies (Tr. 67, 100, 164). Horses were used by the Commission only to move men and supplies over relatively short distances (Tr. 123).

Although it is known that supplies were brought up the Nation River valley for the International Boundary Commission, it is uncertain whether these supplies were brought over land or by poling boat. Transport by poling boat, however, was more likely. It appears that men and supplies were brought up the Nation River and then up Hard Luck Creek. In addition to men and supplies, mail was also delivered by this route (Tr. 798, 799).

The peak of fur trading with the Indians was 1880–1884 (Tr. 85). After a regulation which prohibited non-Natives from trapping was lifted, fur trapping expanded and was heavy in the 1920's, 1930's, and 1940's, until fur prices fell (Tr. 37, 50, 79). Trappers on the Kandik and Nation were supplied by steamboats which delivered goods at the mouth of the Kandik and Nation. The goods were cached until the trappers could haul the supplies to their traplines. The supplies were taken up river either by poling boat,

scow, canoe, or by walking or with dog teams in winter (Tr. 54, 67). Furs were brought down the rivers by boat, and sold at Fort Yukon (Exhibit B–4). There were two known trappers on the Kandik in the 1920's and 1930's (Tr. 51). These trappers used a poling boat on the Kandik (Tr. 115). Eight trappers, one of whom received $8,000 for his furs in one season during the 1930's, trapped the upper Kandik (Tr. 52, 118). A trapping season lasted only 150 days (Exhibit A–4). Some trappers went from the Yukon River up Rock Creek to the Kandik, then up the Kandik, probably by poling boat or folding boat (Tr. 88). The trappers went up Rock Creek to avoid the long meandering part of the Kandik. Two trappers also trapped Rock Creek (Tr. 52).

During a week in August 1978, representatives of the Alaska Division of Forest, Land and Water Management and the U.S. Bureau of Land Management interviewed individuals who were known or believed to have personal knowledge of the Kandik and Nation Rivers. A summary of the interviews was compiled into a report (Exhibit A–4). Certain information contained in that report is important because it relates to use of the Nation River. According to Mr. Beck, a family of trappers used to travel to the head of the Nation River with their winter supplies in a boat equipped with an inboard motor. The family trapped in the headwaters of the river. Further, Christopher Nelson used to boat his trapping supplies upriver to his cabin at the mouth of Jungle Creek. Jungle Creek is above the selection area on the Nation River (Exhibit A–4, p. 1–2). In the 1930's Jim Taylor trapped in the Nation River basin. When the river was high, Taylor took a boat with an outboard motor about 40 miles upriver. He had three or four cabins on the river. Taylor trapped the Hard Luck Creek and Tatonduk River areas. One of Taylor's cabins was located on a side creek, about 35 miles upriver, near the International Boundary (Exhibit A–4, p. 6). Mr. Snow stated that a 17-foot canoe could be used to haul 600 to 800 pounds up the Nation River in all stages of water level, although it would be necessary at times to line the canoe. He also stated that a 19-foot canoe could be taken upriver for quite a distance (Exhibit A–4, p. 9). In the 1920's, Mr. Stacy was in the upper Nation River country with a partner trapping beaver. They descended the river in June in a mooseskin boat, having reached the river from the Kandik River and Ogilvie River country. They had about 40 beaver skins with them when they descended the river. When they reached the Yukon River, a trapper took them to Eagle. This was the only time Mr. Stacy claimed to have descended the Nation River (Exhibit A–4, p. 10).

There are trapping trails on the Kandik and the Nation and there are 35 to 40 cabins, on both rivers, still used by trappers, hunters, and travelers (Tr. 59, 65). The trails are not meant for summertime use (Tr. 113). At the present time, the trapping season lasts from November until March. Furs are exchanged for cash through middlemen in Eagle. Generally, none who currently trap on either river transport furs by boat or canoe. This is because the middlemen in Eagle want the furs before breakup because the quality of furs decreases after breakup (Tr. 257–59).

Charlie Biederman, a witness for Doyon, lived for many years near the mouth of the Kandik River. He has gone up the Kandik right after the Yukon would break, which would be anywhere from the middle of May to the 20th of May. He has also gone up the Kandik as late as the end of September. Mr. Biederman's reason for going was to hunt. Mr. Biederman has also hunted on the Nation during the last 10 years and he owns a 32-foot river boat with a 4-foot bottom which he built himself.

Mr. Biederman has only gone up the Kandik to trap beaver as far as Johnson's Gorge, which is 24 miles from the mouth of the river and below the selection area. Mr. Biederman never went beyond Johnson's Gorge because there was no reason

to go farther since game was plentiful until that point and others were trapping above Johnson's Gorge. Mr. Biederman has never run into serious problems with log jams on the Kandik and if he had had a reason to take a 24- or 26-foot river boat that far up the river, in his opinion, nothing would stop him (Tr. 736, 737, 763).

Mr. Biederman testified that quite a few hunters go up the Kandik every year and that these hunters use river boats. These boats are between 24 and 26 feet in length and have a 42-inch or 46-inch bottom. The boats are metal and usually have a lift that the outboard motor sits on. A lift is a device which lifts a motor if the boat is going to be used in shallow water. These hunters are from Fairbanks. At Circle the hunters put their boats into the Yukon and from there they go up to the Kandik River. The hunters go moose hunting as far up the Kandik as 60 or 70 miles. The duration of their stay on the Kandik is usually 4 or 5 days to a week. The moose are loaded into boats and are brought down the river. A moose weighs 500 or 600 pounds, although some are bigger. Some hunters use jet boats (Tr. 719–22).

Breakup is not a single event. During breakup, a segment of the river thaws and results in a large flow of ice for 2 or more days. Later, another segment of the river further north will thaw and result in another ice flow. Accordingly, breakup lasts at least 10 or 12 days and creates many ice flows. During this time, navigation of all rivers is dangerous (Tr. 259).

Transportation by water was one of the critical factors enabling the interior of Alaska to be opened to exploration and settlement (Tr. 94, 95, 806). The Yukon River provided the primary artery through Alaska (Tr. 132). Early Russian and English traders used rough whipsawed scows and rafts to transport trade goods (Exhibit B–4, p. 135). Soon after the purchase of Alaska by the United States, steamboat traffic on the Yukon began and the supply problems faced by the early traders and explorers was alleviated. Steamboat traffic on the Yukon was sporadic until gold was discovered in the Klondike, at Fairbanks, and at Nome. The high point in steamboat traffic came in 1904 when more than 200 steamboats of various sizes were on the Yukon (Tr. 132). Steamboats were the primary transportation system which supported the fur trade and goldrush activities in interior Alaska (Tr. 36–37, 44). The use of steamboats was initially restricted to the Yukon and the Porcupine River, which was the only Yukon tributary on which steamboats could be used, until special light draft steamers were designed for use on the Tanana and Koyukuk Rivers (Tr. 45).

Dependence on the Yukon River steamboat traffic declined substantially after 1923 when the Alaska railroad provided a link between the port of Seward and the Yukon River (Tr. 132). In 1929 a road was completed which linked Circle and Valdez (Exhibit B–4, p. 175). In 1950 a highway was completed between Eagle and Tetlin Junction (Exhibit A–2, p. 67). These alternate routes of travel led to the end of commercial steamboat travel on the Yukon. By 1955 the Yukon commercial steamboat traffic had ceased (Exhibit A–2, p. 67).

A recent study indicates that commercial traffic on the Yukon between Circle, Eagle and Dawson is not economically feasible. Air and winter overland transportation are used to support development activities in the area. Contractors in oil and gas development in the general area of the Native selections, for example, do not use the Kandik River for transportation. Oil drilling equipment is brought to drilling sites by air and once, during the winter, equipment was brought overland (Tr. 404, 405).

There has been slow economic development in the Yukon-Charley area because of the absence of overland trails, and the Kandik and Nation basins are still undeveloped (Tr. 95). Although there are roads in the Yukon-Charley area there are still no roads north of the Yukon River

and there are no lakes suitable for float planes to land (Tr. 93, 823).

Although the Yukon steamboats carried the bulk of the commercial river traffic, a variety of watercraft has been used historically on the interior waterways.

The Yukon poling boats were adapted from boats used earlier on western rivers. This type of boat was 20 to 30 feet long. At midship the bottom measured from 12 to 20 inches. Tapering sides gave these boats 2½ to 3 feet of beam at the gunwale. Though tapering rapidly at both ends, these boats were usually built with snub noses at both bow and stern. To propel the boat, two or more men would stand in the boat and push the boat upstream by means of long poles. Using a poling boat, two men could transport as much as a ton of cargo (Exhibit A–2, p. 44; Exhibit B–44, p. 158; Tr. 45). In shallow water on tributary streams, a poling boat with a load could travel approximately 10 miles per day (Tr. 747). The larger steamboats were not used on the tributaries of the Yukon because there was not enough freight generated on those streams to call for use of these larger boats. Poling boats, however, were used on tributaries of the Yukon. Poling boats were used on a regular basis to serve communities and transport freight, and tunnel boats were used extensively by the Alaska railroad and others (Tr. 135, 138, 145, 170). There were, however, low draft steamboats developed for use on the Porcupine and other tributaries, which drew only 6 inches of water (Tr. 46).

Motorboats came into use in Alaska after World War I. Some of the first motorboats were converted poling boats (Tr. 137). Liftable motors were often attached to enable boats to travel over shallows. These boats are in use today and although the draught of the boats is constant, with the engine raised the boats can get over shallow spaces. The boats, accordingly, can be loaded more heavily (Tr. 161, 162). Another type of boat used in Alaska is the tunnel boat. Although tunnel boats were used in Alaska as early as 1915, they were not used in the Yukon-Charley area until the 1940's (Tr. 161, 723). The "tunnel" was designed to protect the propeller when the boat traveled in shallow water (Tr. 138, 723). A tunnel boat, like a poling boat, could carry a ton of cargo (Tr 138).

Jet boats are in common use today and have been for the last 7 to 8 years (Tr. 758). Jet boats are flat-bottomed river boats 20–26 feet in length, approximately 4 feet wide, which are equipped with a 25 to 50 h.p. outboard motor with a jet unit (Tr. 567).

Since statehood, there has been recreational use of the Kandik River. BLM's's Navigability Investigation Report on the Kandik and Nation Rivers notes that the Kandik and Nation Rivers are becoming popular recreational rivers. At least two parties had been observed on the Kandik in 1978 while three parties were seen on the Nation in 1 day. Users of these river line canoes up and float down (Exhibit B–37).

The overall characterization of the Kandik River for recreational purposes is that it is suitable for people with intermediate canoeing skills, but not for people with minimal skill (Tr. 520). The dangers on the rivers are caused by sweepers and timber piles, rather than from white water problems (Tr. 282).

Discussion, Findings, and Conclusions

In the order issued on October 21, 1977, the Alaska Native Claims Appeals Board noted that the parties were in agreement as to the test of navigability which would be controlling in this matter. The Board ordered that the test of navigability was to be the test set forth in *United States* v. *Holt State Bank*, 270 U.S. 49, 56 (1926).

There is a distinction between navigability for title and navigability for other purposes. Originally, the courts applied the same test in all navigability cases. In *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940), the Supreme Court indicated that navigability for title might be defined differently

than navigability for other purposes. A major difference between the two legal standards seems to be that, for title navigability, a stream must be navigable in its natural condition at the time the State in which the stream is located joins the Union; whereas navigability for regulation of commerce, or for other reasons, may arise after the date of statehood and may take into account navigational improvements to the stream. The latter is a more liberal test.

As an example of one of the various less stringent tests, in *People* v. *Mack*, 19 Cal. App. 3rd 1040, 97 Cal. Rptr. 448, 454 (1971), a California court held that recreational use itself established navigability and there was no need to show that the waterway is useful as a public highway for travel and commerce. Whereas, in *Procter* v. *Sim*, 236 P. 114 (1925), a Washington court held that recreational use alone was not sufficient to establish navigability under the Federal test, but that usefulness for commerce is necessary to establish navigability.

Two Alaskan courts have considered navigability issues. In *U.S.* v. *Clyde D. Glass, et al.*, Civ. No. 3473 (U.S. Dist. Ct. Nome, Sept. 29, 1941) the District Court for the Territory of Alaska found the Niukluk River to be navigable. In finding the river navigable, the court, without comment, simply applied the Federal test of navigability. In *State of Alaska* v. *Walt Wigger and Morton de Lima Co., Inc.*, Civ. Action No. 62-388 (Super. Ct., Fourth Judicial Dist., Jan. 29, 1965), the Superior Court for the State of Alaska found the Chena River to be navigable. In its decision, the Superior Court stated that any determination of the navigability of rivers within Alaska involves the application of Federal law, under which it is settled that the test of navigability of a river, for the purpose of adjudicating ownership of a river's bed, is to be determined as of the time of the State's admission to the Union. Further, as to the appropriate test to be applied in determining whether a river is navigable, the court adopted the principles developed in *The Daniel Ball*, 77 U.S. 557 (1870), *The Montello*, 87 U.S. 430 (1874), *United States* v. *Holt State Bank*, *supra* at 49, and in *United States* v. *Utah*, *supra*. In effect, the Superior Court held that the navigability for title test was the appropriate test to be applied.

The State and Doyon contend that the navigability for title test should not be applied in this matter and that a more liberal navigability test should be used.

I find that the navigability for title test must be used in determining the nature of the Kandik and Nation Rivers. The issue is ownership of the beds of the Kandik and Nation Rivers for the purpose of determining whether they are public lands properly charged against Doyon's total acreage entitlement under the Alaska Native Claims Settlement Act. If the rivers are navigable then title to their beds is in the State; if, however, the rivers are nonnavigable then their beds are Federally-owned and are subject to conveyance to Doyon. There does not seem to be a clearer case of navigability for title purposes. In addition, the Alaska Native Claims Appeal Board ordered that the applicable test is that expressed in *United States* v. *Holt State Bank*, *supra*, which was a title navigability case. Finally, Alaskan courts have applied the title navigability test in similar situations. Accordingly, application of the more restrictive navigability for title test is appropriate.

There are essential elements of the navigability for title test.[4] Navigability for title is determined by the natural and ordinary condition of a stream at the time that the State in which the stream is located entered the Union. A watercourse is probably nonnavigable for title purposes if artificial improvements are necessary to make it useful for trade and travel. The presence of rapids, sandbars, shallow waters, and other obstructions making navigation difficult or even

[4] *National Resources Journal*, Vol. 7, Jan. 1967, pp. 8–25.

impossible in sections, however, does not destroy title navigability so long as the river or part of it is usable or susceptible to use as a highway for commerce for a significant portion of the time, *United States* v. *The Montello*, 87 U.S. 430 (1874); *United States* v. *Utah*, 283 U.S. 64 (1931). The waters must be usable by the "customary modes of trade or travel on water." The essence of the test is that the waterway must be useful as a highway for travel and trade in the local area. Navigability is a factual question tested not by the amount or volume of commerce carried on a river, but by the extent that the commerce carried relates to the needs of the area it serves. A recent case emphasized that sporadic and short-lived use of a waterway for travel and transportation by local residents for their own purposes and not for hire meets the requirement that a waterway be useful as a highway for commerce. *Utah* v. *United States*, 403 U.S. 9 (1971).

The United States Supreme Court held in the *Holt* decision that streams which are navigable in fact must be regarded as navigable in law. The Court stated that streams are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. The Court further stated that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels, or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.

In *United States* v. *Appalachian Power Company*, *supra*, *the* Supreme Court noted that the uses to which streams may be put vary from the carriage of ocean liners to the floating out of logs, and that the density of traffic varies widely from the busy harbors of the seacoast to the sparsely settled regions of the western mountains. The tests as to navigability, therefore, must take these variations into consideration.

The *Holt* case was an action brought by the United States to quiet title to the bed of Mud Lake in Minnesota, which had been drained and turned into agricultural land at the time the lawsuit was filed. The United States argued that at the time of statehood, before Mud Lake was drained, it was nothing more than a marsh, falling far short of being a navigable body of water.

The Supreme Court held that Mud Lake was navigable. The court relied on three factors. First, Mud Lake was traversed by Mud River, which was both navigable in itself and directly connected with other navigable streams leading out of State. Second, there was evidence that early visitors and settlers in that vicinity used the river and lake as a route of travel, employing the small boats of the period for the purpose of travel. Because the country surrounding the lake was swampy, the waterways were the only dependable routes for travel and trade. Third, merchants in two small settlements several miles up Mud River from the lake had used the river and lake in sending for and bringing in their supplies. The limited navigation and sparse evidence of use was attributable to the fact that trade and travel in the vicinity of the lake were limited.

An important element of the *Holt State Bank* test of navigability requires that waters be usable as highways for commerce by the customary mode of trade and travel on water. The Supreme Court recognized in *Holt* that canoes and small row boats constituted important means of communication and transportation in early days throughout much of the west, and therefore, may be considered "commercial" for purposes of determining navigability for title. *United States* v. *Holt State Bank*, *supra*, 270 U.S. at 56–57.

In *United States* v. *Utah*, 283 U.S. 64 (1930), the Supreme Court elaborated upon the definition of navigability set forth in *Holt*. The United

States had argued that the absence of historical data showing navigation by Indians, fur traders, and early explorers demonstrated that the rivers in question were not navigable. The Court, however, rejected this argument and stated that the nonsettlement of the area in which the rivers were located and the consequent lack of historical data showing navigability should not preclude the possibilities of growth and future profitable use of the rivers. The Court further rejected the argument that evidence of private use of a river is not sufficient to demonstrate capability for commercial use. The Court stated that, although evidence of the actual use of streams and especially of extensive and continued use for commercial purposes may be the most persuasive evidence of navigability, where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved. The Court stated that the question of navigability remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these needs may arise in connection with the growth of population, the multiplication of activities, and the development of natural resources. This capacity may be shown by physical characteristics and experimentations as well as by the uses to which the streams have been put.

In the *Utah* case, the Court found that certain sections of the San Juan, Green, and Grand Rivers were navigable despite the presence of numerous obstacles such as sand bars, rapids, and rocks which made navigation difficult at times and even impossible on occasion. In finding portions of these rivers to be navigable, the Court emphasized that the waters within the subject sections could be navigated part of the time and thus the subject sections were usable in their natural state. The Court distinguished two previous cases which had held the Rio Grande in New Mexico and the Red River in western Oklahoma to be nonnavigable. In those cases, the use of the streams for purposes of transportation was exceptional, being practicable only in times of temporary high water. *See United States* v. *Rio Grande Dam and Irrigation Co.*, 174 U.S. 690 (1899); *Oklahoma* v. *Texas*, 258 U.S. 574 (1921).

In *The Montello*, *supra*, the Fox River was found to be navigable. This river, in places, had falls and rapids. Vessels used on the river measured from 70 to 100 feet in length and were 20 feet wide. At some places on the river where it was impracticable for the boats to be floated, the boats would be unloaded and a "portage" would be made until the difficult stretch of the river was passed. At other places on the river, the boats would be pushed with poles or dragged by horses and mules.

The character of a region, its products, and the difficulties or dangers of navigation influence the regularity and extent of the use. Small traffic compared to the available commerce of the region is sufficient to establish navigability. Even absence of use over long periods of years, because of changed conditions, the coming of the railroad, or improved highways does not affect the navigability of rivers in the constitutional sense. *Appalachian Electric Power Co.*, *supra* at 409. If a river is susceptible to use at the time of statehood, it is navigable, and the fact that actual use never develops does not destroy that navigability.

In *Utah v. United States*, *supra*, the navigability of the Great Salt Lake was at issue. In that case, the evidence of navigation was not extensive, but the court found it to be sufficient to sustain a finding of navigability. There were, for example, nine boats used from time to time to haul cattle and sheep from the mainland to one of the islands in the lake or from one of the islands to

the mainland. The hauling apparently was done by the owners of the livestock, not by a carrier for the purpose of making money. The business of the boats, therefore, was ranching and not carrying waterborn freight. Further the carriage was limited in the sense that it served only a few people who performed ranching operations along, the shores of the lake. The distinctions, however, were found to be irrelevant because the lake was used as a highway and that is the gist of the Federal test.

BLM contends that the Kandik and Nation Rivers are not navigable because their water levels fluctuate, they are hazardous, and only canoes, lightly loaded, can navigate them, because they are interspersed at various points by gravel bars or log jams. Finally, BLM contends that commercial boats carrying freight for hire have not travelled the rivers.

Doyon and the State contend that the rivers are navigable in their entirety or at least as these rivers pass through the selection areas.

I find that both the Kandik and Nation Rivers are navigable all the way from the Yukon River to the Canadian border, and therefore the rivers, as they flow through the selection areas are navigable.

To be navigable, a body of water must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation, *Proctor* v. *Sim*, 236 P. 114 (1925). The Kandik and Nation Rivers are tributaries of the Yukon River. The Yukon was historically the major highway of commerce for the whole of the interior of Alaska and the Kandik and Nation have been the only access of reaching a substantial area north of th Yukon. As such, the two rivers meet the proximity test, *Monroe* v. *State*, 175 P.2d 759 (1946).

Neither the Kandik nor Nation Rivers have been improved at any time. Accordingly, both in 1959 when Alaska entered the Union and at the present time, the rivers are in their natural and ordinary condition. Although rapids, shallow waters, sweepers, and log jams make navigation difficult on both rivers, the evidence shows that these impediments do not prevent navigation.

The presence of gravel bars, riffles, or occasional log jams in themselves do not make the rivers nonnavigable, *United States* v. *Utah*, *supra*. Neither the Kandik nor the Nation has falls and rarely do obstructions block the channel completely. This is notwithstanding that there was testimony that one may have to pole or line a boat over shallow places. Even in August, a time of very low flow, several inches of water flowed over the gravel bars.

Boats capable of carrying commercial loads, *i.e.* such quantities of goods as are necessary on a given trip to produce a profit for the person making the trip, are capable of, and have gone up both rivers from the Yukon to the Canadian border. These are the poling, tunnel and river boats. Charlie Biederman had gone no farther up the Kandik River than Johnson's Gorge because game was plentiful and he, therefore, had no reason to go farther. Mr. Biederman, however, testified that had he had a reason to go farther up the river, nothing would stop him.

Those working for the International Boundary Commission were paid to bring mail and supplies up the entire length of the Kandik and up the Nation to Hard Luck Creek. The Nation above Hard Luck Creek to the Canadian border was trapped by men, some of whom have made profits from furs. Until trapping became unprofitable in the 1940's, the trappers brought supplies up both rivers by boat and brought furs downriver by boat. At the present time, those trapping on both rivers do not bring furs downriver by boat. but this is because middlemen in Eagle to whom the furs are sold prefer to have the furs before breakup and not specifically because of river conditions.

Although use of the Kandik and Nation Rivers has been slight in comparison with other rivers in more populated areas,

the remote and sparsely settled nature of the area in which the Kandik and Nation Rivers are located is an important consideration. As in *Utah* v. *United States*, *supra*, carriage of goods on both the Kandik and Nation Rivers has been extremely limited. In fact, the only commerce conducted has been trapping, trading, and the transport of supplies and furs by the few trappers on the river and the supplying of goods and mail to the International Boundary Commission. Nevertheless, despite only limited commerce on the rivers, use of the rivers meet requirements of the Federal test for navigability since the rivers have been used as a highway.

Although standing alone it may not suffice to support a finding of title navigability, use of the rivers by those pursuing a subsistence lifestyle and use of the rivers for recreation corroborate that the rivers are navigable. Hunters and canoeists do not bring their boats to these rivers by road and then use only selected portions of the rivers. Rather, hunters and canoeists get to the upper reaches of both the Kandik and Nation Rivers by way of the Yukon River. Those using the Kandik and Nation for recreation must bring any supplies needed with them and they must carry out any game caught by boat. As was the situation with the original Native inhabitants, those pursuing a subsistence lifestyle are dependent on the rivers for summer travel and given the sparse resources of the Yukon-Charley-Region, the entire lifestyle is one which presupposes the interconnecton of the Kandik and Nation with the Yukon River. Summer fishing is conducted on the Yukon while winter trapping is conducted on the Nation or Kandik. In effect, the Kandik and Nation are not isolated areas for either recreational users nor for those pursuing a subsistence lifestyle. Rather, together with the Yukon River, the rivers are avenues of access to the land north of the Yukon.

At the time of statehood, due to economic decline, all types of activity had ceased on both the Kandik and Nation Rivers. This nonuse of the rivers at the exact time that Alaska entered the Union, however, does not make the rivers nonnavigable. Use of the rivers by Natives before contact with Europeans, historic use of the rivers by fur trappers, use of the rivers by those working for the International Boundary Commission, and present day use of the rivers clearly establish the navigable nature of the rivers. A short period of nonuse, even though that period fell at the time that the State in which the stream is located entered the Union, does not destroy navigability established at some point while the stream was in its natural condition.

The fact that the rivers are frozen for 7 months of the year and that much of the current mineral exploration of the area is done by use of airplane, does not make the rivers nonnavigable. It is not necessary that navigation continue at all seasons of the year, and a stream does not become nonnavigable even if it has fallen into disuse, *Kemp* v. *Putnam*, 288 P.2d 837 (1955).

Because of the lack of trails and the rough nature in summer of the land surrounding the Kandik and Nation Rivers, travel by water has been the only feasible means of transport of goods between breakup and the time when the rivers freeze. Although the Kandik and Nation have been used only for intrastate commerce, such a use is acceptable under the navigability for title test. Navigability of a river is not tested by the amount or volume of commerce carried but the extent that the commerce carried relates to the needs of the area it serves. Both the Kandik and Nation are tributaries of the Yukon and even the upper reaches of both rivers are accessible to habitation and transportation routes. The rivers can be used to go someplace, as, for example, those employed by the International Boundary Commission used the Kandik to reach the Canadian boundary and trappers on the Nation used that river to obtain and transport furs. In effect, both rivers have been used for commercial

travel. Although the rivers are remote and the evidence of travel on them is sparse, commerce carried on the rivers has been sufficient to establish navigability since the commerce which has been shown to exist relates to the needs of the region in which the rivers are located. The question as to the practicability of navigating the rivers for profit must be left to the one who undertakes the enterprise.

ORDER

The Kandik and Nation Rivers are navigable streams.

L. K. LUOMA,
Chief Administrative Law Judge.

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ISLAND CREEK COAL CO.

1 IBSMA 316

Decided *December 21, 1979*

Appeal by the Office of Surface Mining Reclamation and Enforcement from that part of a July 12, 1979, decision by Administrative Law Judge Tom M. Allen vacating Violation No. 2 of Notice of Violation No. 79–I–15–8 issued pursuant to the Surface Mining Control and Reclamation Act of 1977 (Docket No. CH 9–68–R).

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Evidence

Where the evidence presented by OSM in support of a cited violation of the initial regulatory program performance standards is that the inspector relied on representations made to him in writing the violation, such evidence must be sufficient to withstand challenges to the substance of the representations made and to the authority to bind the permittee of the individual making the representations.

2. Surface Mining Control and Reclamation Act of 1977: Topsoil: Generally

A showing of contamination is not a necessary requirement in establishing a topsoil removal violation pursuant to 30 CFR 715.16. Protection of topsoil from contamination is merely a reason for the removal requirement, not a requirement itself.

APPEARANCES: Billy Jack Gregg, Esq., Office of Field Solicitor, Charleston, West Virginia; Shelley D. Hayes, Esq., Office of Solicitor, Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed from that part of a July 12, 1979, decision by Administrative Law Judge (ALJ) Tom M. Allen vacating Violation No. 2 of Notice of Violation 79–I–

15–8 issued to Island Creek Coal Co. (Island Creek).[1]

While the Board is in agreement with the ALJ's conclusion to vacate Violation No. 2 and therefore affirms that conclusion, we do not agree with other aspects of his decision and modify it as set forth below.

Factual and Procedural Background

On Mar. 28, 1979, three OSM inspectors visited Island Creek's Rebel No. 2 surface coal mining operation in Logan County, West Virginia, and issued Notice of Violation 79–I–15–8 charging Island Creek with (1) allowing discharges from the disturbed area in excess of the applicable effluent limitations for iron and total suspended solids in violation of 30 CFR 715.17(a) and (2) failing "to remove topsoil as a separate operation from areas to be disturbed to prevent the topsoil from being contaminated by spoil" as required by 30 CFR 715.16(a).

Island Creek sought review of the notice of violation; a hearing was held and the ALJ issued his decision on July 12, 1979. He upheld the validity of Violation No. 1, but vacated Violation No. 2. OSM appealed that part of the decision vacating Violation No. 2. OSM filed a timely brief. Island Creek did not file a reply brief nor did it take any other action in connection with this appeal.

[1] The notice was issued pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271 (a)(3) (Supp. I 1977) and 30 CFR 722.12.

Discussion

The topsoil violation concerned an area of about one acre in size (Tr. 63). In that area, as depicted in OSM's photograph, Exh. 9, a road was being constructed down to the first tier of a fill (Tr. 59). The OSM inspector did not actually go to the violation area because of the "lateness of the day" but observed it from a lower bench level looking across the hollow (Tr. 71–72).

When questioned how he knew there was a topsoil violation, the OSM inspector stated that he had seen "the material actually there, right on the edge of the fill material and also from Mr. Buckberry's statements, as to his method of topsoil removal from this area" (Tr. 69).[2] The inspector admitted, however, that he did not see any spoil being placed on topsoil and that topsoil could have been removed from the area which was disturbed previous to his inspection, but "after discussing the matter with Mr. Buckberry as to the method of operation on that fill area, it was indicated to me that the topsoil was still in place and would be removed at a later date" (Tr. 70). Thus, it is clear that for the purposes of writing the topsoil violation the inspector was relying on the representations of Buck-

[2] The inspector explained that he was told that one Joe Buckberry was in charge of the operation and was also the reclamation superintendent of the job (Tr. 106). The record does not disclose who conveyed this information to the inspector.

berry and this was admitted by the inspector (Tr. 76).

Richard J. Bielicki, Director of Engineering, Island Creek Division of Island Creek Coal Co., testified that Buckberry was the reclamation supervisor for Rebel Coal Co., the independent contract miner for Island Creek at this minesite (Tr. 80–82). Bielicki explained Buckberry's position as follows: "He supervises the placing of topsoil on backfill material. He supervises the sampling of the topsoil to see what soil nutrients are required, and he supervises the administration of fertilizer, mulch and the seeding requirements for that backfill area" (Tr. 82). Bielicki stated that Buckberry had nothing to do with the operation aspect, the planning, or the design of Rebel Coal Company's mining in the permit area (Tr. 82). In testimony concerning OSM's Exh. 9, Bielicki stated that he knew that all topsoil was salvaged from the first 2,000 feet of the roadway, but that he could not state for a fact whether topsoil was saved from the remaining 1,500–2,000 feet of the road (Tr. 91–92).

[1] In *Burgess Mining and Construction Corp.*, 1 IBSMA 293, 86 I.D. 656 (1979), a similar factual situation existed, that is, an OSM inspector relied on representations made to him in writing a topsoil violation. In *Burgess* we affirmed the sustaining of the violation by the ALJ because there had been no challenge to either the substance of the representations made or to the authority of the individual making the representations to bind the company by his statements. These challenges were present in this case. Consequently, while the evidence produced by OSM may have been sufficient to support a topsoil violation, Island Creek presented adequate evidence not only to rebut OSM's evidence but to carry its ultimate burden of persuasion. *See* 43 CFR 4.1171(b).[3] For that reason, we affirm the ALJ's conclusion to vacate the violation.

In reaching this conclusion the ALJ made certain statements and findings with which we do not agree. On page 13 of his decision he stated:

> I must therefore find from the evidence that (1) the Act does not make it mandatory for the removal of *all* topsoil encountered in a mining operation but does require the saving of sufficient (and I might add it should be *abundantly* sufficient) to completely satisfy the requirement of the regulatory authority and the Act to reclaim all of the disturbed lands required by the same to be reclaimed as a post-mining operation. [Italics in original.]

In "finding" that the Act does not "make it mandatory" to save all topsoil, the ALJ interpreted the law to require the saving of only an amount of topsoil which is "abundantly sufficient" to satisfy the requirements of the regulatory authority. This interpretation has no basis in law.

[3] Although the evidence produced by OSM may have survived an appropriate motion at the conclusion of OSM's presentation, its meager nature enhanced Island Creek's opportunity to carry its burden.

Carbon Fuel Co., 1 IBSMA 253, 86 I.D. 483 (1979), and *Alabama By-Products Corp.*, 1 IBSMA 239, 86 I.D. 446 (1979), hold that 30 CFR 715.16 requires the removal of all topsoil unless the use of alternative materials is approved by the regulatory authority in accordance with 30 CFR 715.16(a)(4). In *Burgess Mining and Construction Corp.*, *supra* at 298, we stated that, even if the suggestion that less than all topsoil must be removed in every case appeals to common sense, such an exception must be authorized by law upon the approval of the regulatory authority.[4] There is no evidence here that Island Creek sought or had approval from the regulatory authority to remove less than all the topsoil.

The Administrative Law Judge also stated at page 5: "It would appear that the applicant had applied to the regulatory authority for approval under 30 CFR 715.16(a)(4) since the permit, according to the respondent's witness, granted the use of 'suitable materials for reclamation.'" The permit in this case was issued in 1975. The fact that a 1975 state permit authorized the use of "suitable materials" for reclamation does not excuse the permittee from compliance with the Federal interim regulations, nor can such language in the permit be construed as compliance with the alternative materials procedures of 30 CFR 715.16(a)(4). *See Carbon Fuel Co.*, *supra* at 257, 86 I.D. 485 (1979); *Alabama By-Products Corp.*, *supra* at 243, 86 I.D. 448–49 (1979).

[2] Finally, the ALJ stated at page 13 that OSM "failed to show proof of any contamination" in support of the topsoil violation. A sowing of contamination, however, is not a necessary requirement in establishing a violation. The regulation requires that topsoil be removed "[t]o prevent topsoil from being contaminated * * *." 30 CFR 715.16. The protection of topsoil from contamination is merely one reason for the removal requirement; it is not a requirement itself. Therefore, the issue of contamination is not a proper subject for consideration in the context of determining whether or not there has been a topsoil violation.

The ALJ's decision vacating Violation No. 2 of Notice of Violation 79–I–15–8 is affirmed as modified.

MELVIN J. MIRKIN,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

[4] Although we find the ALJ's interpretation to be in error, we realize that when he issued his decision below he did not have the benefit of these Board decisions.

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